Supreme Court, U.S.
FILED

No. (1)

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In The

Supreme Court of the United States

CHRISTOPHER M. GAMBLA,

Petitioner,

v.

KIMBERLY K. WOODSON,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a court's use of race as the basis for determining child custody violate the Equal Protection Clause of the Fourteenth Amendment?

2. Does a court's consideration of race as a factor in child custody determinations violate the Equal Protection Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioner is Christopher M. Gambla, an individual. He was petitioner in the Circuit Court and petitioner-appellant in the Appellate Court. He brings this action on his own behalf.

Respondent is Kimberly K. Woodson, an individual. She was respondent in the Circuit Court and respondent-appellee in the Appellate Court.

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JURISDICTION

The Illinois Appellate Court for the Second District entered its judgment on July 31, 2006. Appendix 1a. Petitioner Christopher M. Gambla seeks review of that judgment on a writ of certiorari.

On August 30, 2006, Petitioner timely filed a petition for appeal as a matter of right or leave to appeal in the Illinois Supreme Court. On November 29, 2006, the Illinois Supreme Court filed an order denying that petition. Appendix 73a. The present petition is timely filed under 28 U.S.C. § 2101(c) and Rule 13.1 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review on a writ of certiorari the judgment of the highest court of a State in which a decision could be had.

CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case presents important questions about the consideration of race in child custody determinations.

The Appellate Court in this case interprets *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) as conditionally allowing the consideration of race: "Indeed, it appears that so long as race is not the sole consideration for custody decisions, but only one of several factors, it is not an unconstitutional consideration." Appendix 44a. This interpretation raises the question of whether race can be used as the basis for determining child custody when, as in the instant case, for example, the parties are held equal as to all other factors. It additionally raises the question of whether race can even be considered in child custody determinations.

This case was denied review at the Illinois Supreme Court. It is noteworthy that other state courts of last resort have issued conflicting opinions on whether race is an allowable consideration in determining child custody, interpreting this Court's findings in *Palmore* as allowing race as one factor among several that may be considered in making custody determinations, and alternately, prohibiting the consideration of race altogether.

A. Factual Background – Circuit Court

1. Pre-Trial

The parties filed petitions for dissolution of marriage in the Eighteenth Judicial Circuit Court of Illinois in May 2003 (R. C0001, C0815). Each party sought sole custody of their biracial daughter, Kira, then seven months old, and Ms. Woodson thereafter sought leave to remove child to

North Carolina. Ms. Woodson is African American and Mr. Gambla is Caucasian.

The Circuit Court entered an order on September 24, 2003, for evaluation of the issues of custody, visitation, and removal by Dr. Daniel J. Hynan (R. C0082-C0083). After interviewing, evaluating, and testing the parties, including observing each of the parties with Kira, Dr. Hynan recommended it was in Kira's best interest Mr. Gambla have her primary residential care and sole custody subject to a visitation schedule for Ms. Woodson. Appendix 126a. Dr. Hynan recommended against removal of Kira from Illinois.

Upon Ms. Woodson's motion, the Circuit Court entered an order for a second evaluation of the child's best interest (R. C0126-C0130). Ms. Woodson selected Dr. Roger P. Hatcher to evaluate the issues of custody and visitation. After interviewing, evaluating, and testing the parties, including observing each of the parties with Kira, Dr. Hatcher recommended Mr. Gambla be the custodial parent of Kira subject to a visitation schedule for Ms. Woodson. Appendix 150a.

Ms. Woodson thereafter engaged Dr. Charles L. Alexander and Dr. Anita Thomas to review and provide opinions on the evaluation reports and data of Drs. Hynan and Hatcher, which included an interview of only Ms. Woodson.

Dr. Thomas was asked to review the reports from a culturally sensitive perspective and concluded, in part:

- "African American women face unique interaction of racism and sexism, and they face stereotypes based on the historical legacy of slavery. Images of African American

women differ from White women and they are seen as dominant, aggressive, sexually promiscuous, rebellious, rude, and loud." Appendix 167a.

- "There is an inherent power difference between Mr. Gambla and Ms. Woodson; he is a white male, with a certain level of privilege, and she is an African American female, who is often overlooked due to racism and sexism." Appendix 168a.
- "Repression is an adaptive coping mechanism from slavery, and the result of racism and sexism." Appendix 169a.
- "Less attention needs to be paid to the socialization of her [Kira's] white racial identity." Appendix 170a.
- "[H]er [Kira's] physical appearance will always set her apart as different." Appendix 170a.
- "I would recommend that the couple engage in mediation services to receive training in co-parenting to lead to shared or joint custody." Appendix 173a.

Dr. Alexander found in his report, in part, "It is quite possible that in their assessment and presentation of the data, both Drs. Hynan and Hatcher were betrayed by their own relative biases." Appendix 185a. Dr. Alexander concluded that the evaluation reports and associated recommendations provided by Drs. Hynan and Hatcher were biased in favor of Mr. Gambla. Appendix 186a.

Drs. Hynan and Hatcher provided rebuttal opinion reports that largely disagreed with the findings of Drs. Thomas and Alexander. Appendix 188a, 204a.

Mr. Gambla filed a motion in the Circuit Court to bar the report and testimony of controlled expert witness Anita Thomas, Ph.D., alleging, in part:

- "Dr. Thomas [sic] report interjects racial, gender/sexism, and social class issues relating to African/American women to support her conclusions." Appendix 101a.
- "[T]he U.S. Supreme Court has held that the goal of granting custody based on the best interests of a child is indisputably a substantial governmental interest which invokes the Equal Protection Clause. ***Palmore v. Sidoti***, 466 U.S. 429, 104 S.Ct.1879 (1984)." Appendix 101a-102a.
- "[T]he U.S. Supreme Court has specifically rejected the consideration of racial biases, or the effects of racial prejudices and classifications, in considerations of child custody matters as a violation of the Equal Protection Clause of the Constitution. ***Palmore v. Sidoti***, 104 S.Ct. at 1879." Appendix 102a.
- "[W]ere the Court to consider the report of Dr. Thomas or hear her testimony on issues which pertain to classifications of race, gender, culture, and socioeconomic issues as set forth in her report, the Court would consider possible private biases wholly outside the mandated statutory factors, which are outside of the Court's subject matter jurisdiction and would violate the Petitioner/Counter-Respondent's rights to equal protection under the law." Appendix 102a.

At the hearing on Mr. Gambla's motion, his attorney argued, "But some of the theories that are argued in this

the Court should not consider. They are impermissible under the constitution." Appendix 110a. "[E]ssentially if you are going to consider, no matter what weight you give, you are going to consider racial factors in custody evaluations or attack them because of theories supporting racial factors. [sic] I think it's unconstitutional and I think you are violating the equal protection clause." Appendix 111a.

After hearing arguments the Circuit Court entered an order denying the motion to bar the report and testimony of Dr. Thomas. Appendix 113a, 115a.

2. Trial

The parties' trial lasted 15 days between May and July 2005. Ms. Woodson called Dr. Thomas as a controlled expert witness at trial. During voir dire, Dr. Thomas opined that biracial children, in cases where both parents have in all other respects equal functioning, are best placed with the minority parent (R. C2133). Dr. Thomas also opined that racial identity is a very important criteria in evaluating parenting (R. C2143).

Mr. Gambla objected when it was moved that Dr. Thomas be found an expert. His attorney argued, "if we're going to open up this custody evaluations [sic] for criticism, by her criteria, and this is what really troubles me, which are personal and societal biases based on race and gender, we are now getting into the area where, I believe, respectfully, and I cited this in my motion, that the Court ought not to consider these areas, because it's a violation of the equal protection clause." Appendix 119a. "We are now considering racial criteria, and we cannot do that in – and I cited this case, Paomore [sic] v. Sidoti, P-a-o-m-o-r-e [sic], v, S-i-d-o-t-i, 466 U.S. 429, 104 Supreme Court 1879,

it's a 1984 court case, and the Supreme Court specifically rejected the consideration of racial biases or the effect of racial prejudices and classifications in consideration of child custody matters in violation of the equal protection clause of the constitution." Appendix 119a.

The Circuit Court overruled the objection, qualifying Dr. Thomas as an expert to render an opinion relative to the process by which the opinions reached by Drs. Hynan and Hatcher came about, and prohibited Dr. Thomas from opining on custody due to a lack of qualifications in such area. Appendix 120a-122a.

Dr. Thomas thereafter testified:

- African American women are often ignored (R. C2187);
- Kira would not get the racial identity that she needs if she lives predominantly with Mr. Gambla (R. C2223);
- Kira does not need to have exposure to Mr. Gambla to have a white racial identity (R. C2224);
- If Kira lived with Ms. Woodson, Kira could get enough of her Caucasian identity from society in and of itself (R. C2224);
- Kira would get a better sense and part of her racial identity from living with Ms. Woodson (R. C2223-C2225);
- African American mothers are critical for the development of racial identity in African American children, that they are greatly influential in developing that sense of self, and that black mothers are instrumental in

discussing racism with their children (R. C2225);

- Children are much more comfortable asking their mothers about racial experiences than their fathers (R. C2226);
- It is better to raise a black child in an all black community than to raise the child in an integrated community (R. C2231); and
- Ms. Woodson regarded herself as a victim of racism in the evaluations (R. C2233-C2234).

3. Post-Trial/Pre-Judgment

The Circuit Court issued its letter of opinion at the conclusion of trial, stating that it considered the testimony of all witnesses, exhibits admitted into evidence, and the statutory factors to be considered when determining custody, as contained in 750 ILCS 5/602(a). Appendix 63a. It found the parties to be equal after its consideration of the eight (8) specific factors enunciated in the statute. "As can been [sic] seen by a review of the above, this case is exceedingly close on the issue of custody. The only good news is that no matter which way the Court comes down on the award of custody, the child will be in good hands and will be properly cared for." Appendix 68a. "We are left with two loving, caring and able parents who can't agree on what to do with their daughter." Appendix 68a.

Thereafter, the court considered the issue of race.

> "The Statute also requires the Court to consider all relevant factors in addition to those specifically enunciated in the Statute. The Respondent has asked the Court to consider the issue of race in making its award of custody. Her experts, Dr.

> Thomas and Dr. Alexander, though not making a formal recommendation as to custody, seemed to be testifying for the proposition that solely because the Respondent is African American and because Kira is a biracial child, her custody should be awarded to the Respondent. In this case, the Court finds no compelling reason to accept that broad stroke approach. However, it is true that the Respondent will be able, if awarded custody, to provide Kira with a breadth of cultural knowledge and experience that the Petitioner will not be able to do. Kira will have to learn to exist as a biracial individual in a community and society that is sometimes hostile to such an individual." Appendix 68a-69a.

The court then awarded "custody to the Respondent [Ms. Woodson] based on her slightly better ability to provide for the emotional needs of the child which may be occasioned by her special circumstances as discussed above [her ability to provide a breadth of cultural knowledge and experience to help Kira learn to exist as a biracial individual]." Appendix 69a.

The court found each of the parties fit and proper persons to be awarded Kira's custody and to exercise full visitation and parenting rights. Appendix 69a.

B. Factual Background – Appellate Court

Mr. Gambla timely appealed the custody decision to the Illinois Appellate Court, Second District, raising the following issues:

- "Whether the Circuit Court erred as a matter of law considering race as a factor in determining child custody, thereby denying

Christopher's right to equal protection under the law." Appendix 124a-125a.

- "Whether the Circuit Court erred as a matter of law allowing the question of race alone to outweigh all other considerations and be decisive on the question of child custody." Appendix 124a-125a.

The Appellate Court heard oral arguments, and on July 31, 2006, affirmed the judgment of the Circuit Court with specially concurring and dissenting opinions.

The Appellate Court majority held:*

- "Illinois case law provides that race may be considered, but that it may not outweigh all of the other relevant factors." Appendix 41a.
- "Illinois case law is in line with a United States Supreme Court case, *Palmore v. Sidoti*, 466 U.S. 429, 80 L.Ed.2d 421, 104 S.Ct. 1879 (1984)." Appendix 43a.
- "The Supreme Court determined that the custody award was unconstitutional, not because the trial court considered race, but because the trial court considered *solely* race." Appendix 43a.
- "Indeed, it appears that so long as race is not the sole consideration for custody decisions,

* The "Factual Background" of the Appellate Court opinion includes Ms. Woodson's testimony about Mr. Gambla allegedly using an epithet. Appendix 16a. The "Factual Background" of that opinion does not include Mr. Gambla's testimony denying such allegation, and it does not include Ms. Woodson's stipulation, at the request of the trial court, that Mr. Gambla was not racially bigoted or prejudiced against African Americans (R. C2396-C2401).

but only one of several factors, it is not an unconstitutional consideration." Appendix 44a.

- "With the parties being equal as to all of the above statutory factors, the trial court looked to other relevant factors. One factor was the fact that Kira is both African-American and Caucasian and that, as an African-American woman, Kimberly could provide Kira with a 'breadth of cultural knowledge' as to her African-American heritage." Appendix 41a. "The trial court believed that this factor [race] tipped the scale slightly in Kimberly's favor, and it awarded Kimberly sole custody of Kira." Appendix 41a.

The Appellate Court dissent held:

- "[T]he trial court erred in basing its custody award on race." Appendix 56a.

- "[T]he remarks in the trial court's letter of opinion show that the court's decision for custody improperly hinged on the sole factor of race: that only an African-American person can properly raise a biracial child in this society." Appendix 58a.

- "An award of custody based solely on race is impermissible, as an improper exercise of a trial court's discretion. *Fountaine v. Fountaine*, 9 Ill.App.2d 482, 486 (1956). The United States Supreme Court has also specifically rejected the consideration of racial biases, or the effects of racial prejudice and classifications, in child custody matters as a violation of the equal protection clause of the United States Constitution (U.S. Const., amend. XIV). *Palmore v. Sidoti*, 466 U.S. 429, 432, 80 L.Ed.2d 421, 425, 104 S.Ct.

> 1879, 1881-82 (1984). Thus, the trial court here erroneously used race as its basis for awarding custody." Appendix 58a.

REASONS FOR GRANTING THE WRIT

A. The *Palmore* Case

Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) involves a mother and father, both Caucasian, who divorced and the mother was awarded custody of their minor daughter. The mother subsequently lived with and then married an African American man which prompted the father to sue for change of custody. The trial court changed custody because the child was likely to experience discrimination if she remained in a biracial household.

This Court found that the trial court "was entirely candid and made no effort to place its holding on any ground other than race." 466 U.S. at 432, 104 S.Ct. at 1881.

> "A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed[1] discrimination based on race. See *Strauder v. West Virginia*, 100 U.S. 303, 307-308, 310 (1880). Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. See *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256,

[1] "The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Ex parte Virginia*, 100 U.S. 339, 346-347 (1880)." 466 U.S. at 432, 104 S.Ct. at 1882.

272 (1979)." 466 U.S. at 432, 104 S.Ct. at 1881-1882.

"It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." 466 U.S. at 433, 104 S.Ct. at 1882.

This Court reversed, stating that "[t]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody." 466 U.S. at 434, 104 S.Ct. at 1882-1883.

B. The Appellate Court Decision Conflicts With An Existing Supreme Court Decision

The Appellate Court considered the following: "The trial court noted that Kira would have to learn to exist as a biracial woman in a society that is sometimes hostile to such individuals and that Kimberly would be better able to provide for Kira's emotional needs in this respect." Appendix

41a. This strikes at the heart of *Palmore*. "The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations[.]" * * * "We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. at 1882. The Appellate Court did not view this consideration by the trial court to be unconstitutional, which conflicts with this Court's decision in *Palmore*.

The Appellate Court interprets *Palmore*: "The Supreme Court determined that the custody award was unconstitutional, not because the trial court considered race, but because the trial court considered *solely* race." Appendix 43a. "Indeed, it appears that so long as race is not the sole consideration for custody decisions, but only one of several factors, it is not an unconstitutional consideration." Appendix 44a. However, this interpretation of *Palmore* still leaves open the possibility of race being the controlling factor – a possibility that is validated when the Appellate Court discusses the trial court's consideration of race:

> "With the parties being equal as to all of the above statutory factors, the trial court looked to other relevant factors. <u>One</u> <u>factor</u> was the fact that Kira is both African-American and Caucasian and that, as an African-American woman, Kimberly could provide Kira with a 'breadth of cultural knowledge' as to her African-American heritage [that Mr. Gambla would not be able to do]." Appendix 41a. "The trial court believed that <u>this</u> <u>factor</u> [race] tipped the scale slightly in Kimberly's favor, and it awarded Kimberly sole custody of Kira." (emphasis added) Appendix 41a.

This indicates the custody award is based on race since the parties were, just prior to the consideration of race, equal on all other factors.

It cannot be envisioned that the intent of *Palmore* is to simply consider other factors when considering the factor of race, and that that will avoid any unconstitutional consideration of race. It is still possible for race to be the basis of the determination in this instance, arguably even more possible, since race becomes an "authorized" consideration by such an interpretation. The question then becomes, what is the allowable weight to be given to race in a child custody determination? (Dr. Thomas was not able to answer the question of how much time a biracial child needs to spend with the African American parent to develop their African American identities (R. C2224-C2225).) *Palmore* at least says that race cannot be the basis for the decision. In this case, race was the basis for the decision because the parties were held equal as to all other factors. Thus, the Appellate Court's decision conflicts with this Court's decision in *Palmore*.

Even if the Appellate Court's interpretation of *Palmore* is that race can be considered so long as the decision is not impermissibly based upon it, this would also seem unconstitutional. The very act of considering race requires a State to admit, contrary to the U.S. Constitution, there are differences in human beings because of their physical characteristics. In this regard, the Appellate Court's consideration of race in any fashion is in conflict with this Court's decision in *Palmore*.

C. Decisions Conflict Among State Courts Of Last Resort

This case was denied review at the Illinois Supreme Court. It is noteworthy that state courts of last resort have

issued conflicting opinions on whether race is an allowable consideration in determining child custody, interpreting this Court's findings in *Palmore* as allowing race as one factor among several that may be considered in making custody determinations, and alternately, prohibiting the consideration of race altogether.

The opinions of two cases for each interpretation are provided from state courts of last resort in Kentucky, Tennessee, South Dakota, and Nebraska, as follows.

1. *Palmore* Interpreted As Prohibiting The Consideration Of Race

Holt v. Chenault, 722 S.W.2d 897 (Ky. S.Ct. 1987) involves a mother and father, both Caucasian, who divorced and the mother was awarded custody of their minor daughter. The mother subsequently remarried an African American man and the father sought change of custody. The trial court changed custody on the basis of its findings of facts, which included, "among other things, Respondent's interracial marriage and the child's willful reactions to manifestations of racial prejudice, her discontent and intent to run away." *Id.* at 898. On review, the Kentucky Supreme Court held, "The primary issue in this case is whether a trial judge may consider the issue of race in determining a question of child custody. We declare that he may not, based on the case of *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984)." *Holt v. Chenault*, 722 S.W.2d at 897. The court held that "the trial court erred by giving effect to private racial biases" *Id.* at 898, and directed the trial court to "make new findings of fact which do not reflect racial concerns." *Id.* at 899.

Parker v. Parker, 986 S.W.2d 557 (Tn. S.Ct. 1999) involves a divorcing white couple and the initial contested

custody of their minor son. The trial court allowed a witness to testify about the alleged harmful effects of an interracial relationship on a minor child; the mother allegedly had a relationship with her employer, an African-American man. The trial court awarded custody of the minor child to the father. The mother appealed, in part, on grounds that "the issue of race was injected into the proceeding and improperly considered by the court in making its custody decision." *Id.* at 562. The Tennessee Supreme Court held: "In considering all relevant circumstances, however, a court may not consider the effects or alleged effects of racial prejudice." *Id.* at 562. "This Court is troubled by the interjection of race based testimony in these proceedings, which is so clearly prohibited in *Palmore*." *Id.* at 563. "Under the authority of *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), the trial court clearly erred by allowing the introduction of the nurse practitioner's testimony regarding the alleged harmful effects on the child from an interracial relationship. The admission of this testimony seemingly violated *Palmore*'s prohibition against heeding private biases." (BIRCH, J., concurring.) *Parker v. Parker*, 986 S.W.2d at 564.

2. Palmore Interpreted As Not Prohibiting The Consideration Of Race

Jones v. Jones, 542 N.W.2d 119 (S.D. S.Ct. 1996) involves a divorcing couple and the initial contested custody of their biracial children. The mother is Caucasian and the father is Native American. The trial court awarded the parties joint legal custody of the children with primary physical custody being awarded to the father. The trial court wrote in its memorandum opinion:

"Plaintiff addressed the issue of racial discrimination and Native American culture in his testimony. He states that all three children would be discriminated against as Native Americans if they left Penrhos farm to live. He wants for them the same loving, non-discriminatory upbringing that he received as a child at Penrhos. Plaintiff also wants to continue to make the children aware of their culture and heritage and participate in Tribal functions. [citation omitted]. This is an example of the Plaintiff's concern for the totality of the upbringing of his children. However, this Court's determination of custody must be made on a racially neutral basis as far as concerning itself with the effects of any potential discrimination." *Id.* at 123. The mother appealed, in part, on grounds "the trial court wrongfully considered race when determining the best interests of the children." Id. at 121. In support of her argument, she cites *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). The South Dakota Supreme Court found that "the [trial] court was apparently aware of its [*Palmore*'s] holding and scrupulously honored it." *Jones v. Jones*, 542 N.W.2d at 123. It found that "[w]hile the trial court was not blind to the racial backgrounds of the children, we are satisfied that it did not impermissibly award custody on the basis of race." *Id.* at 123. "We hold that it is proper for a trial court, when determining the best interests of a child in the context of a custody dispute between parents, to consider the matter of race as it relates to a child's ethnic heritage and which parent is more prepared to expose the child to it." *Id.* at 123-124. "Under our holding, the person is the central focus of the analysis and not their race. There is simply no governmentally imposed discrimination based on race." *Id.* at 124.

Brown v. Brown, 621 N.W.2d 70 (Ne. S.Ct. 2000) involves divorced parents sharing joint legal and physical custody of their two children. The mother petitioned, in part, for sole legal and physical custody of the children and removal to New York. The mother argued that the children, as members of a racial and ethnic minority, would be better off in the diverse population of New York than the less diverse community of Lincoln. The trial court determined it was not in the best interests of the children to set aside the arrangement of joint custody and that the best interests of the children did not favor a move to New York. The mother appealed, reasserting in part her contention that the children, as members of a racial and ethnic minority, would be better off in the diverse population of New York. The Nebraska Supreme Court stated, "We have not previously discussed the degree to which racial identity might be weighed in the context of custody determinations. The Nebraska Court of Appeals, however, recently confronted a similar question in *Ebirim v. Ebirim*, 9 Neb.App. 740, 620 N.W.2d 117 (2000)." *Brown v. Brown*, 621 N.W.2d at 82-83. "The Court of Appeals determined that 'the collected cases indicate that [race] is generally considered as one factor among several in evaluating the best interests of the child,' [citation omitted], and concluded that the race of the child could be considered as 'one factor among several in custody determinations[.]'" *Id.* at 83. The Nebraska Supreme Court distinguished *Palmore* as "finding [the] Equal Protection Clause [was] violated where race of [the] child was [the] *sole factor* in making custody determination" and concluded "that a child's racial identity is one factor among several that may be considered in making custody determinations." *Id.* at 83.

D. This Case Involves An Issue Of Fundamental Importance

The Appellate Court has determined that the consideration of race in child custody determinations, and child custody determinations based on race, are not unconstitutional, but allowable under the law. This is a fundamentally important issue because the Appellate Court's opinion conflicts with a decision of this Court, and because other state courts and state courts of last resort conflict with each other and a decision of this Court.

As a result of the Appellate Court decision, future parties involved in child custody disputes can be disadvantaged, out of the gate and anytime thereafter, because of race. "This raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879 (1984).

CONCLUSION

For the foregoing reasons, Christopher M. Gambla respectfully requests the Court to grant his petition for certiorari.

Respectfully submitted,

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853 N.E.2d 847

APPENDIX A

No. 2-05-0971

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF CHRISTOPHER M. GAMBLA,	) Appeal from the Circuit) Court of Du Page County.
Petitioner-Appellant,	) No. 03--D-1116
and	) Honorable
KIMBERLY K. WOODSON,	) C. Stanley Austin,) Judge, Presiding.
Respondent-Appellee.	)

(Filed Jul. 31, 2006)

JUSTICE GILLERAN JOHNSON delivered the opinion of the court:

The petitioner, Christopher Gambla, appeals, *pro se,* from the September 1, 2005, order of the circuit court of Du Page County dissolving his marriage to the respon dent, Kimberly Woodson. On appeal, Christopher argues that the trial court erred in awarding custody of the parties' minor child, Kira Marie, to Kimberly.

I. FACTUAL BACKGROUND

The parties were married on May 11, 2002, in Atlanta, Georgia. Christopher is Caucasian, and Kimberly is

African-American. Shortly after they married, the parties moved to Illinois, along with Che Woodson, Kimberly's then six-year-old son from a previous marriage. One child was born to the parties' marriage: Kira Marie, born on October 19, 2002. On May 13, 2003, Christopher filed a petition for dissolution of marriage in which he sought sole custody of Kira. On May 14, 2003, Kimberly filed a counterpetition for dissolution of marriage in which she also sought sole custody of Kira.

Between May 31, 2005, and July 5, 2005, the trial court conducted 15 days of trial, at which the parties, one court-appointed expert, three experts retained by Kimberly, and several character witnesses testified. Their testimony is as follows.

A. Christopher's and His Witnesses' Testimony

1. Christopher

Christopher testified that he lives in West Chicago, Illinois, along with his sister and her husband and their three children. Christopher's mother lives in an apartment on the lower level of the residence. Christopher has owned the home since August 1997. Christopher's office is in his home. He is a transportation consultant with Lea and Elliot, a company that designs and implements railway systems worldwide. Christopher has worked for Lea and Elliot since March 2001. Christopher has an undergraduate degree in business from the University of Dubuque, Iowa, and a master's degree in business from Benedictine University in Lisle, Illinois.

Christopher started dating Kimberly in March 2000. The parties stopped dating in November 2001, but resumed the relationship in January 2002. Kimberly became

pregnant in February 2002. At this time, Kimberly was residing in Georgia and Christopher was residing in Texas. After the parties relocated to Illinois in June 2002, they moved into the lower-level apartment of Christopher's home in West Chicago. Christopher's mother moved up to the main level with his sister and her family. Christopher did not observe any problems between Kimberly and his mother or between Kimberly and his sister and her family.

In September 2002, Kimberly informed Christopher that she was unhappy living in the West Chicago home, because she felt uncomfortable around his family. Subsequently, the parties moved into an apartment in Wheaton. According to Christopher, he was involved in Kimberly's prenatal care and was present for the birth of Kira at Central Du Page Hospital. The parties had planned to have a home birth. After complications ensued during Kimberly's labor, Christopher was instrumental in getting Kimberly to the hospital.

Following Kira's birth, Kimberly started to exhibit bizarre behaviors that led him to suspect she was depressed. A few weeks after Kira's birth, Kimberly insisted on taking Che and Kira to Atlanta to visit her family for Thanksgiving. Although he did not agree with the trip, he accompanied Kimberly. On the drive to Atlanta, Kimberly refused to eat or speak. About a month after Kira's birth, Christopher came home and found Kimberly sleeping in the closet, curled up in a fetal position. A few months after Kira was born, Christopher and Kimberly got into a verbal disagreement that escalated into Kimberly striking Christopher with a shirt while he was holding the baby.

Christopher testified that he and Kimberly frequently disagreed regarding the care of Kira. For example, ten

days following Kira's birth, Kira needed treatment because of a discharge from her right eye. Kimberly refused a medicine, known as erthromycin, for Kira's eyes. Kimberly told Christopher that she did not want Kira to have the drug because she feared that it would interfere with breast-feeding. Kira has since had eye problems such as conjunctivitis and styes. Additionally, Kira was not given her immunizations on schedule, because Kimberly did not want her to receive all the immunizations at once. Christopher also disagreed with several trips that Kimberly took with Kira to New Jersey, North Carolina, Atlanta, and Alabama, because of Kira's young age.

Christopher testified regarding a three-week trip that Kimberly took with Che and Kira to Atlanta in May 2003 to be with her mother following her mother's cataract surgery. Christopher had planned to fly to Atlanta on the weekends so that he could spend time with Kira. The second weekend that Christopher flew to Atlanta, he was unable to visit with Kira, because Kimberly had taken her on a road trip to Birmingham, Alabama. Christopher cancelled his trip to Atlanta the third weekend because Kimberly informed him that she would be visiting family in Charlotte, North Carolina. He instead flew down on a Thursday. Christopher went to Kimberly's Georgia home, but was not permitted to enter. Kimberly initially refused to let Christopher take Kira, but eventually allowed him to take Kira to his hotel for a few hours.

In June 2003, when Kimberly returned from her trip to Atlanta, she moved out of the marital bedroom and into Che's room, whom she had left in North Carolina to attend school. Kimberly did not tell Christopher for several months what had happened to Che. Christopher always had enjoyed various activities with Che, such as flying

kites and going to the park. Kira's crib remained in the marital bedroom. Kimberly cared for Kira during the day while Christopher was at work, and Christopher cared for Kira in the evening and on the weekend. During his evening time, Christopher would feed and bathe Kira and prepare her for bed. Kimberly was breast-feeding Kira and would pump breast milk for Christopher to feed Kira.

In February 2004, about the time Dr. Daniel Hynan performed a custody evaluation on the parties, Kimberly started feeding and bathing Kira and preparing her for bed. Christopher asked to resume these duties but Kimberly would not agree. Kira did continue to sleep in Christopher's room. Christopher eventually began to take Kira to his West Chicago home so that he could have more parenting time with her. Kimberly and Kira moved out of the apartment in September 2004. Kimberly did not tell Christopher where she was moving.

Christopher recalled an incident in March 2004 when he returned from work and noticed that Kira had red blotches all over her body. He asked Kimberly what had happened to Kira, and Kimberly responded that she did not know. Christopher went to the drugstore and purchased some children's Benadryl. Christopher administered to Kira a dose of the Benadryl and her symptoms improved. The following day, Kimberly told Christopher that Kira had eaten a peanut butter cookie. Christopher knew that Che was allergic to peanuts, so he took Kira to Wheaton Pediatrics to have her tested for allergies. Dr. Grunewald diagnosed Kira as allergic to peanuts. According to Christopher, Kira receives her allergy medication only when she is with him.

Christopher testified that Kimberly continues to breast-feed Kira but no longer provides Christopher with any breast milk to feed her. Christopher further testified that he and Kimberly disagree about whether to feed Kira meat and whether to provide Kira with fluoridated water. Christopher would like Kira's diet to include chicken, pork, beef, and fish. He also would like Kira to have fluoridated water. According to Christopher, Kimberly is very concerned about the cost of diapers and does not change Kira as often as he does. Kimberly often accuses Christopher of being controlling.

2. Dr. Hynan

Dr. Daniel Hynan, whom the parties stipulated to be qualified as an expert, testified that he was a licensed psychologist ordered to perform a custody evaluation regarding the instant case. Dr. Hynan prepared a report recommending that Christopher be given sole custody of Kira. In his report, Dr. Hynan noted that Kimberly is a full-time homemaker. Kimberly has family in Charlotte, North Carolina, and in the Atlanta, Georgia, area. Kimberly was seeking to remove Kira to North Carolina to be near her family there. Kimberly intends to seek full- or part-time employment as a nurse and hopes to be able to share a nanny with her niece, who is pregnant. Kimberly indicated in an interview with Dr. Hynan that she had experienced depression after she delivered Kira but that she opted not to pursue medication, because she was breast-feeding. Kimberly also indicated that she is interested in pursuing a holistic or alternative approach to Kira's health care and was reluctant to have Kira immunized.

Kimberly completed the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), a test that measures emotional and personality functioning. Kimberly answered questions in a somewhat defensive manner that is associated with limited personal insight. Despite her defensiveness, Kimberly had a significant elevation on a scale that indicates impulsiveness, difficulty with authority, and limited frustration tolerance. She also had an elevation on a supplemental scale that indicates the use of repression as a psychological defense, and she had an elevation close to the standard cutoff point on a scale that indicates low impulse control.

Kimberly also completed the Adult-Adolescent Parenting Inventory, a measure of parenting attitudes and beliefs. Kimberly scored better than average on scales that measure empathy, disciplinary style, and maintaining an appropriate parental role. She scored average on a scale that measures the appropriateness of developmental expectations. Dr. Hynan opined, however, that Kimberly's defensiveness calls into question the validity of the parenting test results.

Dr. Hynan noted that Christopher is employed full-time and has family in the West Chicago and Chicago areas. If Christopher is granted custody of Kira, his sister, with whom he resides, would care for Kira during working hours. Kira would share a room with Christopher for the time being and later share a bedroom with her cousin Anna. Christopher reported that he has not experienced any significant psychological problems, although he has felt distressed over the break-up of his relationship with Kimberly. Christopher advocates conventional health care for Kira.

Christopher took the MMPI-2 test. Christopher had elevations on supplemental scales that represent beliefs about social responsibility and working actively on controlling anger. That said, Christopher answered questions highly defensively, which, according to Dr. Hynan, calls into question the validity of the personality-test results. Dr. Hynan believes that Christopher's elevations are likely due to his defensiveness.

Christopher also completed the Adult-Adolescent Parenting Inventory. He scored better than average on all of the scales. However, Christopher again answered questions defensively, calling into question the validity of the parenting-test results.

Dr. Hynan based his recommendation that Christopher be granted sole custody primarily on two reasons, one being that he believed that the statutory factor of the interaction of the child with the parents and siblings favored Christopher. Dr. Hynan explained that he was concerned about Che's diagnosis and problems with attention deficit disorder and whether Kimberly was properly treating Che for it. Dr. Hynan also explained that he was concerned with Kimberly's preference for alternative health care.

The second reason upon which Dr. Hynan based his recommendation was that he believed that the statutory factor of the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child favored Christopher. Dr. Hynan acknowledged that each party voiced a willingness and ability to facilitate a good relationship between Kira and the other parent. Additionally, both parties were participating in a routine in which Kira

had good access to both parents. However, Kimberly was pursuing a removal petition, which would make it much more difficult for a close and continuing relationship between Christopher and Kira. Dr. Hynan stated that Kimberly's removal petition "had a major impact in that obviously that's what her primary wish was to do, and perhaps, obviously, it therefore, needed to be considered, because it was part of the order to consider it."

Dr. Hynan opined that joint custody would not be in Kira's best interest, due to the parties' lack of communication and significant disagreements over health care. Additionally, Dr. Hynan cited the parties' differing preferences about Kira's schooling. Christopher would like Kira to attend a parochial school and be raised Catholic. Kimberly would like Kira to attend a public school and be exposed to different religious denominations.

3. Dr. Hatcher

Dr. Roger Hatcher, whom the parties stipulated to be qualified as an expert, testified that he was a licensed psychologist ordered to perform a custody evaluation regarding the present case. Dr. Hatcher prepared a report, similar to Dr. Hynan's, recommending that Christopher be given sole custody of Kira. Dr. Hatcher reported that Kimberly presented as an attractive, well-dressed woman with good hygiene. Kimberly was fully cooperative, appeared thoughtful in her responses, and articulated her concerns about the divorce and custody struggle very well. Kimberly gave no indication of psychiatric distress, but did appear somewhat guarded and controlled.

Dr. Hatcher testified that he relied on Dr. Hynan's MMPI-2 test results, which showed a "mild clinical level

elevation of the four scale." According to Dr. Hatcher, individuals with Kimberly's profile often struggle with self-centeredness and have difficulty maintaining long-term relationships, due to their tendencies to put their own needs before the needs of others. Kimberly is likely seen by others as somewhat immature, narcissistic, and egocentric. Although Kimberly is likely to make a good first impression and others may see her as outgoing and energetic, she tends to be inwardly resentful and antagonistic when she feels mistreated. However, Kimberly's feelings of anger and aggression are more likely expressed in passive and indirect ways rather than through physical attack or confrontation. Dr. Hatcher believed that although Kimberly's responses on the MMPI-2 test administered by Dr. Hynan showed a mild level of guardedness, her test results were valid.

Dr. Hatcher administered to Kimberly the Millon Clinical Multiaxial Inventory-3 (MCMI-3) test. Kimberly scored well on the Modifying Indices Scale, indicating that her answers were forthright and honest. There were no findings of significant psychiatric disorders, such as depression. There was a significant elevation of the Narcissistic Personality scale. Kimberly's narcissistic tendencies are evident mostly in her difficulties with empathy and the development of close relationships and in her tendency to put her own needs ahead of the needs of others.

Dr. Hatcher reported that Christopher was alert and appropriately neatly-dressed. Christopher was anxious about the divorce and custody proceedings and articulate in expressing his concerns. Christopher gave no indication of psychological impairment. Dr. Hatcher did note that Christopher tended to be a rather carefully organized,

compulsive individual, who provided "reams of written documentation" and scrutinized every comment of the examiner.

Dr. Hatcher opined that Christopher's results on the MMPI-2 test administered by Dr. Hynan were also valid, despite Christopher's reported defensiveness. Christopher did not have any significant elevations on any of the clinical scales of the MMPI-2.

Dr. Hatcher administered to Christopher the MCMI-3 test. Christopher's test responses were open and nondefensive. The test gave no indications of personality pathology or major psychiatric disorders. However, there was a significant elevation of the Compulsive Personality Subscale, which suggests that Christopher tends to be tightly controlled, somewhat obsessive, and overly attentive to details. Dr. Hatcher explained that these characteristics may be a great benefit to many people in their chosen professions, as such people would be unlikely to be forgetful in carrying out their assigned duties. However, when taken to extremes, these characteristics can be irritating to others, especially when they cause one to over respond to relatively minor concerns.

Dr. Hatcher noted that Kira was a happy, normal-sized child. She was healthy, affectionate, and social with family and friends. Dr. Hatcher observed Kira during two play sessions, one with Kimberly and one with Christopher. Dr. Hatcher reported that Kimberly interacts with Kira in a quiet, soft-spoken manner. Kira was comfortable and affectionate with Kimberly during the play session. Christopher has a more outgoing parenting style and is verbal and instructive when playing with Kira. Kira

clearly enjoyed herself during the play session with Christopher.

Kimberly reported to Dr. Hatcher that she had changed her plans to pursue removal of Kira to North Carolina, because she believes that such a move would make it difficult for Kira to enjoy a relationship with Christopher. However, Kimberly would like to move from Wheaton into a more diverse community such as Homewood, Oak Park, or Evanston. Kimberly would like to start Kira in a Montessori school program and then would like Kira to continue on to public school. Kimberly would also consider a private school. Kimberly has agreed to let Christopher have Kira baptized in the Catholic church, but she would also like to expose Kira to other religions.

Kimberly indicated to Dr. Hatcher that she would look for a pediatrician and a dentist for Kira who have attitudes about health care similar to her own. Kimberly acknowledged that her attitudes regarding health care are nonconventional but maintained that numerous medical professionals around the country share her views. Kimberly provided Dr. Hatcher with several articles and books that support her positions.

Christopher plans to live in his home in West Chicago. He would have the advantage of relatives within the household who would care for Kira while he was working. Christopher intends to raise Kira as a Catholic. At times, he takes Kira to Sunday mass with him. He would enroll Kira in a Catholic school located in Warrenville. In regard to Kira's health care, Christopher would like her to see his family practitioner.

According to Dr. Hatcher, both parties were fit and competent to independently care for Kira. However, like

Dr. Hynan. Dr. Hatcher recommended that Christopher be given sole custody of Kira, based on Kimberly's nonconventional views regarding health care and his belief that Christopher would better encourage the noncustodial parent-child relationship. As to Kimberly's views on health care, Dr. Hatcher described them as "unusual, perhaps eccentric." As to the ability to encourage Kira to maintain a close relationship with her noncustodial parent, Dr. Hatcher explained that Christopher was more open and articulate, while Kimberly was more closed in her interactions. Dr. Hatcher also cited Kimberly's attempt to remove Kira from Illinois.

4. Arlene Gambla

Arlene Gambla, Christopher's mother, testified that she helps care for Kira at times when Christopher has visitation and he is working. Christopher generally works Monday through Friday, in his home office. Christopher usually has Kira dressed and ready before he goes to his office. During the day, Kira often plays in the backyard on the swingset and in the sandbox. Kira naps between 11 a.m. and 1 p.m. Before Kira lies down for her nap, Arlene reads Kira a devotional book she bought for Kira for Christmas. After Kira wakes up from her nap, Christopher has lunch with Kira. At 5 p.m., Christopher gets off work and takes over Kira's care. Christopher feeds Kira dinner, bathes her, and dresses her for bed. Christopher often reads to Kira and says prayers with her before he puts her down for bed.

Arlene does not communicate with Kimberly very often. When Kira is with Arlene, Kira often talks about Kimberly. Arlene believes that it is normal for Kira to talk

about her mother and does not discourage her. Arlene believes that it is difficult for Kira when she is exchanged between parents. During the exchange, Kira's eyes get real big and dart back and forth. Arlene has never heard Christopher say anything unpleasant about Kimberly in front of Kira.

5. Anthony Morello

Anthony Morello, Christopher's brother-in-law and Kira's godfather, testified that he has observed Christopher interact with Kira. Christopher is very caring and loving toward Kira. Christopher is always focused on Kira's needs. Christopher cooks for Kira, bathes her, and reads to her. Christopher takes Kira to the park and the zoo on weekends. Kira has a great relationship with all of Anthony's children, especially his daughter Anna, with whom Kira now shares a room. Anthony's two sons treat Kira like a sister.

6. Rajkumar Rambhajan

Rajkumar Rambhajan testified that he worked with Christopher at O'Hare Transit System, where Christopher was a supervisor. Christopher supervised several African-American employees, as one-third of the company employees were minorities. Christopher never had any difficulties interacting with his African-American employees.

B. Kimberly's and Her Witnesses' Testimony

1. Kimberly

Kimberly testified that she lives in Naperville with Che, Kira, and her mother, Marian Woodson. Che is 9 and

Kira is 2 1/2. Kimberly's residence is a single-family home, with three bedrooms, a den, and a large yard.

Kimberly attended Rutgers University in New Jersey, where she obtained a bachelor of arts degree in biology and African-American studies. Kimberly also attended New York University, where she earned an undergraduate degree in nursing. Kimberly is a licensed nurse in Illinois. In addition to her undergraduate degrees, Kimberly has a master's degree in public health from Emory University, which enables her to do epidemiological studies and community needs assessments and to implement community health promotion programs. Kimberly has also completed two semesters at Emory University toward a master's degree in nursing, which she plans to complete. Finally, Kimberly earned a certificate in child growth education, through a correspondence course. Kimberly put her studies on hold when she became pregnant with Kira. Kimberly and Christopher had decided that Kimberly would be a stay-at-home mom.

Kimberly moved into Christopher's West Chicago residence in June 2002. They had planned to live there temporarily and then purchase a home of their own. Kimberly was uncomfortable living in Christopher's West Chicago residence, because she did not like how his family treated Che. For example, Che was not allowed to play on the backyard swingset, although the other children were permitted to do so. Kimberly also believed that Christopher was overly critical of Che and reprimanded him too frequently.

Kimberly testified that Christopher's criticism of her as a parent started when Kira was born. Christopher

stayed home with Kimberly for three or four days following Kira's birth. During that time, they had a conversation about religious beliefs and how they would raise the children with regard to religion. The conversation quickly turned into an argument, and Christopher called Kimberly ungrateful and lazy and accused Kimberly of almost killing Kira with her attempt at a home birth.

In November 2002, Kimberly attended counseling for postpartum depression. Christopher attended one of Kimberly's counseling sessions and read aloud a 14-page document in which he questioned Kimberly's religious practices, child-rearing ability, and communication skills.

Kimberly recalled the incident in which Christopher claims that she hit him with a shirt. As Kimberly remembers, one evening in December 2002, she and Christopher argued because he was again criticizing her parenting skills and religious beliefs. Kimberly stated that "he at some point in the argument said to me have I ever called you the N-word and I must think that he was my white boy bitch." She then swore at Christopher, took a lapel tie from her shirt, and in frustration threw the tie at the bed that Christopher was sitting on, but the tie did not hit him.

Kimberly explained her position as to the medicine for Kira's eyes following her birth. Kimberly testified that through her medical training, she was aware that antibiotics are given to babies to prevent eye infections due to sexually transmitted diseases. To her knowledge, Kimberly did not have a sexually transmitted disease at the time of Kira's birth.

Kimberly also explained her position as to Kira's immunizations. Kimberly agreed to immunize Kira, but

wanted to have her immunizations done one by one so that if there was an adverse reaction to one of the shots, she would be able to tell which one caused the reaction.

Kimberly recounted the time that Christopher found her in the closet. According to Kimberly, she was not sleeping. She had just argued with Christopher over how to treat Kira for a cold. Kimberly wanted to place Kira in the shower, while Christopher wanted to bring in a humidifier. Kimberly was very upset that Christopher discounted her idea, and she started crying. When Christopher's mother, sister, and brother-in-law brought a humidifier to the apartment, Kimberly went into the closet because she did not want them to hear her crying.

Kimberly testified that Christopher demanded that she leave the apartment while he spent time with Kira. When she would not agree, he began taking Kira to his West Chicago home to spend time with her. Christopher also frequently made medical appointments for Kira at times that he knew Kimberly would not be available. Christopher would then criticize Kimberly for not being able to attend Kira's doctor visits. Christopher changed Kira's doctor without consulting Kimberly.

Kimberly is concerned that when she comes to pick up Kira at the West Chicago residence, Christopher makes her come to the back door. Kimberly feels that Kira may be getting the message that her mother is not worthy of coming to the front door.

Kimberly testified that she wants Kira to be exposed to different cultures, languages, religions, and ways of thinking. Kimberly wants Kira to be able to travel so that she is exposed to different families and experiences. Kimberly testified that she "wants the world for Kira" and

not a "straight and narrow path." Kimberly testified that when she and Kira spend time together, they dance and sing. Kimberly has enrolled Kira in tumbling class. Kimberly wants to enroll Kira in classes to learn ballet and a musical instrument. Kimberly attends an African-American dance class and has taken Kira to that class on occasion. Kira enjoys dancing with the women and children at the African-American dance class.

Kimberly believes that she can teach Kira a lot about African-American culture, including African-American expressions, the African-American way of moving, African-American celebrations, and African-American family relationships. Kimberly also wants to help Kira learn to cope with being a woman of color.

Kimberly explained that she is reluctant to send Kira to a parochial school. Kimberly believes that it will be too limiting for Kira. Kira will have to wear a uniform and will not be able to wear jewelry other than that which is religious. Furthermore, Kimberly is skeptical that Kira will receive what she needs from a parochial school if she is gifted or for any reason is in need of special attention.

Kimberly testified that Kira has a close relationship with Che. Kira and Che play together. Che reads to Kira. Kira enjoys practicing Tae Kwan Do with Che. Kira turns the pages for Che when he practices the trumpet.

Kimberly testified that she attempts to encourage and facilitate a close relationship between Christopher and Kira. She encourages Christopher to have time alone with Kira. When Kimberly and Christopher were still living together, she would stand next to Christopher so that Kira would be comfortable while he fed and bathed Kira. Kimberly provided Christopher with breast milk to feed

Kira. She leaves lists for Christopher regarding what Kira has eaten and when Kira has napped. Kimberly asks Christopher about his availability before making doctor appointments for Kira. Kimberly has committed to staying in the Chicago area because she believes that it is important for Kira to have a relationship with her father.

2. Dr. Thomas

Dr. Anita Thomas, a psychologist retained by Kimberly, was called to the stand as an expert witness. During *voir dire,* Dr. Thomas testified that she is an associate professor at Northeastern Illinois University. Dr. Thomas teaches multicultural counseling, family counseling, child development, human development, professional identity, and ethics. In addition to her professorship, Dr. Thomas is engaged in private practice as a licensed clinical psychologist. Dr. Thomas counsels individuals, couples, and families.

Dr. Thomas has a Ph.D. in psychology, which she obtained from Loyola University in Chicago in 1995. Dr. Thomas specialized in multicultural counseling and family therapy. Dr. Thomas prepared a dissertation on the racial socialization of African-American families. Prior to her Ph.D., Dr. Thomas obtained a master's degree in community counseling from Loyola in 1992. To obtain this degree, she prepared a thesis on the emotional reactions of children in stepfamilies.

Dr. Thomas has published 17 articles, including several concerning African-American women and children. Dr. Thomas has presented 14 papers and 48 workshops, many of which dealt with understanding African-American culture and African-American families. Dr. Thomas has

had extensive clinical training in interpreting MMPI-2 scores and significant experience in administering the MMPI-2 as part of psychological evaluations of children, adolescents, and adults. Dr. Thomas has twice reviewed test results that other psychologists have administered and scored. Dr. Thomas admitted, however, that she has never before testified as an expert witness.

Following the above testimony, the trial court found that Dr. Thomas was qualified as an expert to render opinions only on the methodologies used by Dr. Hynan and Dr. Hatcher. The trial court did not qualify Dr. Thomas to render an opinion as to which parent Kira should be placed with. Although Christopher's attorney objected to the qualification of Dr. Thomas as an expert, when the trial court asked if he wanted a *Frye* hearing regarding any of Dr. Thomas's respective opinions, Christopher's attorney responded that he did not.

Dr. Thomas testified that there were several cultural concerns that should have been taken into account in evaluating which parent Kira should be placed with. She noted that Kimberly is African-American and Christopher is Caucasian. Dr. Thomas testified that African-Americans are traditionally defined by nine cultural variables: "communalism," or connectedness; harmony; spirituality; "verve," or spontaneity of expression; movement; oral tradition; social time perspective; and expressive individualism. According to Dr. Thomas, several of these variables are important in this case.

First, as to communalism, African-Americans have "fictive kinships," which are comprised of extended family, friends, and members of the community. In consultations, Kimberly indicated that she was extremely close to her

family and that relocation to the Chicago area served as a significant loss of social support for her. The fact that Kimberly is willing to remain in the area demonstrates her commitment to co-parenting with Christopher.

Second, as to "verve," many African-American women find comfort in spontaneity and freedom of expression. This may be seen negatively within the larger community, as it is often mistaken for impulsivity or recklessness. African-American women generally face a stereotype of being dominant, rebellious, aggressive, rude, loud, and even sexually promiscuous. Consequently, expressions of anger in African-American women are often seen as more intense or threatening than they actually are. African-American women typically cope with this by repressing feelings.

Dr. Thomas testified that one should not rely on the written psychological test scores without considering other corroborating evidence. Scores should be interpreted in light of cultural variables and other outside sources of information, such as the fact that Kimberly was living with Christopher in a strained relationship. If indeed Dr. Hynan and Dr. Hatcher failed to consider the cultural variables and other sources of information, their findings may be erroneous.

Dr. Thomas opined that the trial court should take into account Kira's biracial status. In Dr. Thomas's opinion, it is vitally important that Kira be socialized in the African-American culture. Less attention needs to be paid to the socialization of Kira's Caucasian identity, since mainstream culture reflects Caucasian values. In Dr. Thomas's opinion, Kira would get a better sense of her racial identity from living with Kimberly.

Dr. Thomas also opined that Kimberly's ideals concerning health care are more widely accepted than Dr. Hatcher's and Dr. Hynan's evaluations indicate. Dr. Thomas does not believe that Dr. Hatcher's and Dr. Hynan's evaluations provided any concrete evidence against Kimberly's parenting skills. In Dr. Thomas's opinion, Kira would benefit from exposure to different religious practices, which Kimberly plans to provide, because those who are exposed to multiple religious practices have a better sense of their own spirituality as they grow older.

3. Dr. Alexander

Dr. Charles Larson Alexander, a psychologist retained by Kimberly, was called to the stand. During *voir dire,* Dr. Alexander testified that he was a professor at the Illinois School of Professional Psychology, where he earned his doctorate degree in clinical psychology in 1998. Dr. Alexander teaches courses in community mental health, social-psyche indifference, and treatment issues with diverse populations. Dr. Alexander also has a small private practice. Additionally, Dr. Alexander supervises a clinical research project that is a joint venture between Kids United, a nonprofit association, and the Cook County State's Attorney's office. The goal of the research project is to determine the effectiveness of multi-systemic therapy in the treatment of juvenile sex offenders.

Dr. Alexander has performed custody evaluations on three prior occasions. He testified in court in connection with one of those custody disputes and was found to be an expert. Dr. Alexander has administered and scored the MMPI-2 test numerous times. Dr. Alexander frequently reviews other clinicians' interpretations of the MMPI-2, in

the course of his research project. Following the above testimony, the trial court found Dr. Alexander qualified to render expert testimony consistent with opinions disclosed in his written report.

Dr. Alexander testified regarding his report, in which he concluded that Dr. Hynan's and Dr. Hatcher's evaluations were suspect. In reaching this conclusion, Dr. Alexander explained that the mild level of guardedness that Dr. Hynan and Dr. Hatcher observed from Kimberly was not unusual. Rather, it is to be expected within the context of a custody evaluation, due to a parent's desire not to adversely impact how others may perceive him or her. Dr. Alexander pointed out that Dr. Hynan and Dr. Hatcher were far more forgiving with Christopher's guardedness than they were with Kimberly's guardedness.

Furthermore, Dr. Alexander explained that Kimberly's elevation on the four scale of the MMPI-2 was also not unusual and did not necessarily mean that Kimberly had impulsivity or self-control problems. According to Dr. Alexander, African-Americans tend to produce an elevated four scale, given the history and present status of racial and power dynamics in this country. Kimberly's elevated four scale could actually be an indication of strength, not weakness. Additionally, the fact that Kimberly was in an unhappy and unfulfilling marriage could explain the elevated score.

Dr. Alexander opined that Kimberly's test scores should have been reconciled with her social background and the context within which the test was given. The scores also should have been corroborated with other outside information, such as Dr. Hynan's and Dr. Hatcher's impressions of Kimberly and reports from

significant others. Without any corroborating outside information, Dr. Hynan's and Dr. Hatcher's determinations that Kimberly has significant personality traits are speculative.

4. Linda Dorsey

Linda Dorsey, Kimberly's sister from Decatur, Georgia, testified that Kira and Kimberly have a warm and engaged relationship. Kira is very attached to Kimberly. Kimberly and Kira talk, sing, read stories, and frequently laugh. Kimberly breast-feeds Kira, bathes her, and prepares her for naps and bed. Kimberly is patient with Kira. Che and Kira have a good relationship. Kira and Che are very glad when they get to see each other. Kira and Che like to play hide and seek. Che and Kira sing and dance together. Linda has never seen Che act aggressively toward Kira. Kira always wants to be near Che and frequently asks for "Che Che."

5. Dr. Schulman

Dr. Larry Schulman, a licensed clinical social worker, testified that he treated Che in North Carolina. Che is not a danger to himself or anyone else. Che does not have any major psychiatric problems and does not meet the criteria for learning or behavior disorders. Che has a loving relationship with Kira.

6. Donna Stevens

Donna Stevens testified that she was a third-grade teacher at Beebe School in the Naperville Community School District. Donna is Che's teacher. According to

Donna, Che is intelligent, inquisitive, thoughtful and understanding. Che has never shown aggression toward any of the other students. If Che notices that another student in the class is in need of help, he helps him or her. If Che notices another student being left out, he tries to include him or her. Che typically receives average grades.

7. Kate Evans

Kate Evans testified that she is a therapist at the Western Suburbs YMCA. Kate also helps with child care for women going to group therapy on Thursday night. Kimberly attends the Thursday night group and sometimes uses the YMCA child care services for Kira and Che. When Kimberly drops the children off, she makes sure the kids are settled and is sure to tell the kids that she will be done in an hour and a half. Kira and Che play together and are very fond of each other. When Kira gets anxious, Che will hold her. Che interacts well with the other children at the YMCA and seems to make friends quickly.

8. Marianne Cook

Marianne Cook testified that her son Joseph attends school with Che. On the first day of school, Joseph was nervous. Che walked up to Joseph and put his arm around him. Che and Joseph became friends and have played together at each other's homes several times. Marianne has never seen Che misbehave.

C. Christopher's Rebuttal

1. Dr. Hynan

Dr. Hynan testified regarding a report he compiled in rebuttal to Dr. Thomas's and Dr. Alexander's opinions. Dr. Hynan agreed that cultural factors need to be considered in determining custody, including the fact that Kimberly is African-American and the fact that Christopher is Caucasian. Additionally, Dr. Hynan agreed that cultural differences need to be considered in interpreting the MMPI-2 test results. Dr. Hynan opined that there have been "different findings in different specific studies" relating to racial differences in MMPI-2 scores. In some studies, on some scales, African-Americans have higher scores, and in other studies, on some scales, Caucasians have higher scores. Dr. Hynan opined that the differences that do exist tend to be small and not of clinical significance. Dr. Hynan believed that Kimberly's elevations were too significant to be attributed to the fact that she is an African-American woman.

2. Dr. Hatcher

Dr. Hatcher testified regarding a report that he compiled in rebuttal to Dr. Thomas's and Dr. Alexander's opinions. Dr. Hatcher testified that he believed that ethnicity and racial criteria should be considered in determining custody. Dr. Hatcher also testified that there was evidence in his field that African-American women have a slight tendency to score higher on scales that measure defensiveness. Dr. Hatcher was aware of such evidence when he scored Kimberly's test results, but from his personal observations of Kimberly, he believed that the elevations had significance. Dr. Hatcher believed that

Kimberly presented herself to be nonconventional and somewhat rebellious in her attitude, especially toward authority figures.

D. The Trial Court's Decision

On September 1, 2005, the trial court entered a judgment for dissolution, in which it granted Kimberly sole custody of Kira and granted Christopher visitation with Kira. In its August 25, 2005, memorandum opinion, the trial court prefaced the reasons for its determination by stating that awarding Kimberly sole custody had been a difficult decision. The trial court did not believe that Kira would be in physical or emotional danger if placed with either parent, as both parents were good, decent, and honorable people. However, because of their inability to effectively co-parent, the trial court applied the statutory factors in assessing the respective claims for sole custody.

The trial court first considered the respective wishes of Christopher and Kimberly. With regard to this factor, the trial court found that both Christopher's and Kimberly's requests were well-founded and well-intended.

The trial court next considered the wishes of Kira. The trial court found that because Kira was only two, she could not express with which parent she desired to live. The trial court noted, however, that by the accounts of all the witnesses, Kira loves both parents and is happy spending time with each of them.

Third, as to the interaction of Kira with her parents and sibling and other significant persons, the trial court found that Kira has a loving relationship with each parent. Kira also has a loving relationship with her brother

Che. The trial court noted that Kira loves her grandparents, uncles, aunts, and cousins.

Fourth, as to Kira's adjustment to her home, school, and community, the trial court found no indication that Kira has any difficulty in her father's home or her mother's home. Any difficulty that Kira experiences stems from the uncertainty that has flowed from the custody conflict.

The fifth factor considered by the trial court was the mental and physical health of all parties involved. The trial court found that neither Christopher nor Kimberly suffer from any mental or physical maladies that would preclude them from parenting Kira. To the extent that either parent had any elevations on psychological tests administered to them, the court found the elevations insignificant. The trial court noted that although each parent has a very different outlook on what is best for Kira, neither Christopher's nor Kimberly's parenting approach is wrong.

The sixth and seventh factors considered by the trial court were physical violence or the threat thereof and the occurrence of ongoing abuse. The trial court found that there had been no violence by either party directed at the other. The trial court noted that any incidents of conflict had been merely verbal.

The final statutory factor considered by the trial court was the willingness and ability of each party to facilitate and encourage a close and continuing relationship between Kira and the other parent. With regard to this factor, the trial court stated as follows:

"Each party gave lip service to their willingness to do so, but there certainly have been problems doing so during the pendency of this case. The court finds those difficulties to have arisen out of the ongoing inability of the parties to be willing to compromise and communicate, not out of any inherent inability of either party to facilitate that relationship. The Court is aware that both Dr. Hynan and Dr. Hatcher have opined that it is in Kira's best interests that her custody be awarded to [Christopher], primarily, though not exclusively, based upon their opinion that he is the one most able to foster and encourage a close relationship with the other party. The Court has reviewed their written reports and listened closely to their testimony and concludes that the primary basis of that opinion was the pendency at the time they did their evaluation of a [p]etition then on file by [Kimberly] to remove Kira from the State of Illinois and relocate her to North Carolina. Each of those experts acknowledged that that factor weighed heavily in their opinion, and each acknowledged that the fact that the [p]etition has been withdrawn by [Kimberly] would affect the weight to be given to that factor in the basis of their opinions. As can be seen by a review of the above, this case is exceedingly close on the issue of custody. The only good news is that no matter which way the court comes down on the award of custody, the child will be in good hands and will be properly cared for. The efforts by both parties to somehow portray the other as an unfit or uncaring parent has failed, in this Court's opinion. We are left with two loving, caring, and able parents who can't agree on what to do with their daughter."

The trial court also found the fact that Kira is a biracial child to be a relevant factor. The trial court clarified its consideration of Kira's heritage in stating that it did not believe in a "broad stroke" approach, that being that Kimberly should be awarded custody solely because she is African-American. However, the trial court did find that Kimberly would be able to provide Kira with a "breadth of cultural knowledge and experience that [Christopher] will not be able to do." The trial court noted that Kira would have to learn to exist as a biracial individual in a society that is sometimes hostile toward people of different races and that Kimberly would be better equipped to provide for this emotional need of Kira's.

The trial court granted Christopher extensive visitation with Kira. Christopher was to have visitation for a full week at a time on an alternating basis until Kira started school. Once Kira started school, Christopher would have visitation on Tuesdays and Thursdays and on alternating weekends and holidays. During summer breaks between school years, Christopher would resume visitation for a full week at a time on an alternating basis.

Following the trial court's entry of the above judgment for dissolution, Christopher filed a timely notice of appeal.

II. DISCUSSION

On appeal, Christopher contends that the trial court erred in awarding custody of Kira to Kimberly. Christopher's arguments against the trial court's custody determination are essentially twofold. Christopher first argues that the trial court erred in admitting Dr. Thomas's expert testimony. Christopher next contends that the trial court's

determination was against the manifest weight of the evidence.

A. The Admission of Dr. Thomas's Testimony

Christopher's first argument concerns the admission of Dr. Thomas's testimony. In particular, Christopher argues that Dr. Thomas was unqualified and that her opinions were not based on theories generally accepted by the relevant scientific community.

The test for competency of an expert is whether the witness exhibits sufficient knowledge of the subject matter. *In re Custody of Baty,* 83 Ill.App.3d 113, 115 (1980). For a witness to testify as an expert concerning an opinion, it must be demonstrated that the witness possesses special skills or knowledge beyond that of the average layperson. *People v. Hernandez,* 313 Ill.App.3d 780, 784 (2000). The opinion testimony of an expert is admissible if the expert is qualified by knowledge, skill, experience, training, or education in a field that has at least a modicum of reliability, and if the testimony would aid the trier of fact in understanding the evidence. *Snelson v. Kamm,* 204 Ill.2d 1, 24 (2003); *In re Marriage of Jawad,* 326 Ill.App.3d 141, 152 (2001). The determination of a witness's qualifications rests within the sound discretion of the trial judge and will not be reversed absent an abuse of that discretion. *Snelson,* 204 Ill.2d at 24; *In re K.T.,* 361 Ill.App.3d 187, 202 (2005).

That said, an expert witness's opinion cannot be based upon mere conjecture and guess. *Jawad,* 326 Ill.App.3d at 152. An expert's opinion is only as valid as the reasons for the opinion, and the trial court is not required to blindly accept the expert's assertion that his testimony has an

adequate foundation. *Turner v. Williams,* 326 Ill.App.3d 541, 552-53 (2001). Rather, the trial court must look behind the expert's conclusion and analyze the adequacy of the foundation. *Soto v. Gaytan,* 313 Ill.App.3d 137, 146 (2000). Indeed, the trial court plays a critical role in excluding testimony that does not bear an adequate foundation of reliability. *Soto,* 313 Ill.App.3d at 146.

Additionally, in determining whether an expert is qualified to render an opinion based on novel scientific evidence, Illinois follows the test set forth in *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923). See *People v. Eyler,* 133 Ill.2d 173, 211 (1989). Under the standard articulated in *Frye,* the proponent of expert testimony predicated upon a scientific theory must establish that the theory has gained general acceptance in the expert's scientific field. *Turner,* 326 Ill.App.3d at 554. In this context, "general acceptance" does not mean universal acceptance, and it does not require that the methodology in question be accepted by unanimity, consensus, or even a majority of experts. *In re Commitment of Simons,* 213 Ill.2d 523, 530 (2004). Instead, it is sufficient that the underlying method used to generate an expert's opinion is reasonably relied upon by experts in the relevant field. Significantly, the *Frye* test applies only to "new" or "novel" scientific methodologies. *Donaldson v. Central Illinois Public Service Co.,* 199 Ill.2d 63, 78-79 (2002). Generally speaking, a scientific methodology is considered "new" or "novel" if it is "'original or striking'" or "does 'not resembl[e] something formerly known or used.'" *Donaldson,* 199 Ill.2d at 79, quoting Webster's Third New International Dictionary 1546 (1993).

In the case herein, the trial court did not abuse its discretion in qualifying Dr. Thomas to testify. The *voir dire*

of Dr. Thomas was extensive and more than adequately demonstrated her expertise in psychological counseling and testing. Indeed, Dr. Thomas proved herself to be a very learned psychologist who has taught numerous classes on subjects including multicultural counseling, family counseling, child development, human development, and professional identity. Dr. Thomas has also completed and presented dozens of articles, papers, and seminars. Moreover, Dr. Thomas has had significant experience in administering the MMPI-2 test and in interpreting MMPI-2 scores. Dr. Thomas's knowledge, experience, education, and skill in the field of psychology undoubtedly aided the trier of fact in understanding the evaluations performed on Kimberly and Christopher by Dr. Hynan and Dr. Hatcher, the purpose for which her testimony was admitted. It is important to note that the trial court did not find Dr. Thomas qualified to make a custody recommendation, but only to opine on the methods used by Dr. Hynan and Dr. Hatcher in evaluating Kimberly and Christopher. Dr. Thomas was certainly qualified to comment on the methodologies of Dr. Hynan and Dr. Hatcher. Furthermore, we do not believe that the admission of Dr. Thomas's testimony offended the principles espoused in *Frye*. Dr. Thomas's opinions were not based on new or novel methods. This is evident from the testimony of Dr. Alexander, which Christopher does not challenge and which the dissent barely mentions in its analysis. Dr. Alexander's testimony closely resembled Dr. Thomas's on many points. Like Dr. Thomas, Dr. Alexander believed that in scoring Kimberly's personality tests, Dr. Hynan and Dr. Hatcher should have taken into account outside information, such as the fact that Kimberly and Christopher were going through a divorce and custody dispute, and also cultural variables, such as the fact that Kimberly

is African-American. Dr. Alexander agreed with Dr. Thomas that Kimberly's ethnicity could have caused some of her elevated scores. In his report, Dr. Alexander supported these opinions with citations to many learned treatises such as J.N. Butcher & K. Han, *The Development of an MMPI-2 Scale to Assess the Presentation of Self in a Superlative Manner* (1995), and D. Nichols, *Essentials of MMPI-2 Assessment* (2001).

Moreover, even Dr. Hynan and Dr. Hatcher acknowledged in their rebuttal reports that there was authority in their field that indicated that minorities tended to score higher on certain scales. Additionally, both Dr. Hynan and Dr. Hatcher acknowledged that race should be taken into consideration in scoring personality tests and in determining custody. However, despite the fact that both acknowledged that race was a pertinent factor, neither Dr. Hynan nor Dr. Hatcher believed that Kimberly's elevated scores were due to her being an African-American woman.

Finally, of particular significance is the fact that when the trial court asked Christopher if he wanted a *Frye* hearing regarding any of Dr. Thomas's opinions, Christopher, through his attorney, responded that he did not. The failure to request a *Frye* hearing is grounds to treat as waived any objections on review to the foundation of an expert's opinion. See *Snelson,* 204 Ill.2d at 24-25.

We note that, in his brief, Christopher complains that Dr. Thomas's testimony exceeded the limited scope for which it was admitted, because she opined as to which parent should be granted custody of Kira. After closely reviewing Dr. Thomas's testimony and written report admitted into evidence, we do not believe that Dr. Thomas opined as to which parent should be given custody. However,

portions of Dr. Thomas's testimony did slightly exceed the scope of the trial court's limitation. Dr. Thomas's testimony focused on three main areas: (1) cultural variables that commonly affect African-American women; (2) using these cultural variables to score personality tests; and (3) child development concerns such as health care, spirituality, and racial identity. Some of Dr. Thomas's testimony regarding child development did not concern the methodologies employed by Dr. Hynan and Dr. Hatcher, such as Dr. Thomas's testimony that Kimberly would be better able to foster Kira's racial identity. However, much of this testimony was elicited by Christopher during cross-examination and objected to by Kimberly. For example, the following colloquy can be found in the record:

> "[CHRISTOPHER'S ATTORNEY]: When you said Mr. Gambla – do you believe Mr. Gambla couldn't give – excuse me. Kira won't get the racial identity that she needs if she lived predominantly with Mr. Gambla; is that correct?
>
> DR. THOMAS: That is correct.
>
> [CHRISTOPHER'S ATTORNEY]: And that . . .
>
> DR. THOMAS: That is my opinion.
>
> [CHRISTOPHER'S ATTORNEY]: And that's because society is going to give, on it's whole, give her more racial identity of being Caucasian than she will get from living society and getting a black identity . . .
>
> [KIMBERLY'S ATTORNEY]: Objection.
>
> THE [TRIAL] COURT: If you understand that question Doctor, you may answer it. Overruled.

DR. THOMAS: In a yes/no fashion?

THE [TRIAL] COURT: It was a yes/no question, if you can answer it that way.

DR. THOMAS: Can you repeat the question? I'm sorry.

[CHRISTOPHER'S ATTORNEY]: Do you believe that Kira would get a better sense of her – part of her racial identity from living with Ms. Woodson; correct?

DR. THOMAS: Yes.

[CHRISTOPHER'S ATTORNEY]: And you also believe that if she lived with Ms. Woodson, then she could get enough identity for being part Caucasian from society on – in itself?

DR. THOMAS: Yes, that's correct."

Kimberly can hardly be faulted for her expert's testimony exceeding the scope of the trial court's limitation when Christopher elicited such testimony over Kimberly's objection. See *In re Kenneth D.*, 364 Ill.App.3d 797, 803 (2006).

In sum, the trial court did not abuse its discretion in admitting Dr. Thomas's testimony. Dr. Thomas's testimony was not based on a novel or new scientific theory and did not offend *Frye*. Additionally, Christopher is not entitled to a reversal based on the fact that Dr. Thomas's testimony minimally exceeded the scope for which it was admitted, when he himself elicited such testimony.

B. The Sufficiency of the Evidence Supporting the Trial Court's Custody Determination

Christopher's next argument is that the trial court's custody determination was against the manifest weight of the evidence. Christopher argues that the trial court failed to consider all of the requisite statutory factors and improperly considered the fact that Kira is biracial.

In a custody dispute, the primary consideration is the best interest and welfare of the child. 750 ILCS 5/602 (West 2004). A decision regarding child custody will not be disturbed on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Petraitis,* 263 Ill.App.3d 1022, 1031 (1993). A judgment is against the manifest weight of the evidence when the opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based upon the evidence. *In re Marriage of Karonis,* 296 Ill.App.3d 86, 88 (1998). In determining whether a judgment is contrary to the manifest weight of the evidence, the reviewing court views the evidence in the light most favorable to the appellee. *In re Marriage of Divelbiss,* 308 Ill.App.3d 198, 206 (1999). Where the evidence permits multiple reasonable inferences, the reviewing court will accept those inferences that support the trial court's order. *Divelbiss,* 308 Ill.App.3d at 206-07.

We will affirm the trial court's ruling if there is any basis to support the trial court's findings. *Divelbiss,* 308 Ill.App.3d at 207. There is a strong and compelling presumption that the trial court, the entity closest to the litigation, has made the proper custody decision. *In re Marriage of Diehl,* 221 Ill.App.3d 410, 424 (1991). The trial court's custody determination is afforded "great deference" because the trial court is at a superior vantage point to

judge the credibility of the witnesses and determine the best interest of the child. *In re Marriage of Bates,* 212 Ill.2d 489, 516 (2004); *Karonis,* 296 Ill.App.3d at 88. A custody determination inevitably rests on the parties' temperaments, personalities, and capabilities and the witnesses' demeanor. *In re Marriage of Wolff,* 355 Ill.App.3d 403, 413 (2005).

Section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/602(a) (West 2004)) provides that the court shall consider all relevant factors, including: "(1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school and community; (5) the mental and physical health of all individuals involved; (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person; (7) the occurrence of ongoing abuse * * *; and (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child." 750 ILCS 5/602(a) (West 2004). The factors enumerated in section 602(a) are not exclusive. *In re Marriage of Martins,* 269 Ill.App.3d 380, 389 (1995).

In the present case, the trial court conducted 15 days of trial, considered the testimony of 15 witnesses, and received into evidence and reviewed 128 exhibits, after which it carefully weighed each of the statutory factors. Based on those factors, the trial court found the parties to be equally qualified to care for Kira. As to the first factor,

the trial court found that both Christopher and Kimberly desired sole custody of Kira and that their desires were well-intended.

The trial court next considered the wishes of Kira and found that because Kira was only two years old, she could not express her feelings as to with which parent she desired to live. The trial court noted, however, that by the accounts of all the witnesses, Kira loves both parents and is happy spending time with each of them.

Third, as to the interaction of Kira with her parents, sibling, and other significant persons, the trial court found that Kira has a loving relationship with each parent, as well as with Che and her grandparents, uncles, aunts, and cousins. This third factor is very significant here, as the evidence in this case reveals a close relationship between Kira and Che, who resides with Kimberly.

Fourth, as to Kira's adjustment to her home, school, and community, the trial court found no indication that Kira had any difficulty in her father's home or her mother's home. The trial court's findings with regard to these first four factors were fully supported by the parties' and their witnesses' testimony, which established that Kimberly and Christopher each were loving and capable of providing Kira with a stable home.

As to the fifth factor, the parties' mental and physical health, the trial court found that neither Christopher nor Kimberly suffered from any mental or physical maladies that would preclude them from parenting Kira. To the extent that either parent had any elevations on psychological tests administered to them, the court found the elevations insignificant. The evidence as to this factor was conflicting, but nonetheless supported the trial court's

findings that both parents were on equal ground as to their mental and physical health. Dr. Hatcher and Dr. Hynan reported that Kimberly had some psychological difficulties. However, there was inconsistency in Dr. Hatcher's testimony, as he at one point described Kimberly's elevation as merely a "mild clinical elevation." Furthermore, Dr. Thomas and Dr. Alexander believed that Dr. Hatcher and Dr. Hynan may have failed to take into account pertinent outside factors in scoring Kimberly's personality tests. The trial court apparently found Dr. Hatcher's and Dr. Hynan's testimony to be slightly impeached, which the trial court was certainly entitled to do. It would be error to second-guess the trial court's findings here, as the trial court was in a superior position to judge the credibility of the witnesses. *Bates,* 212 Ill.2d at 516; *Karonis,* 296 Ill.App.3d at 88.

As to the sixth and seventh factors, the trial court found no evidence of physical violence or ongoing abuse. Although Christopher in his testimony alluded to some acts of physical violence by Kimberly, the trial court found otherwise. Again, the trial court was in the best position to judge the credibility of the witnesses, and the trial court should not be second-guessed on this point. *Bates,* 212 Ill.2d at 516; *Karonis,* 296 Ill.App.3d at 88.

Finally, the trial court considered the willingness and ability of each party to facilitate and encourage a close and continuing relationship between Kira and the other parent. With regard to this factor, the trial court found that both parents needed improvement in this area. The trial court noted Dr. Hynan's and Dr. Hatcher's opinions that Christopher was more equipped than Kimberly to encourage a close relationship between Kira and her noncustodial parent. However, the trial court found that

their opinions appeared to have been based in part on the fact that Kimberly was pursuing a removal petition. Because Kimberly had since changed her plans to move to North Carolina, the trial court found the parties equal on this factor. The trial court's inference that Dr. Hynan's and Dr. Hatcher's opinions were partly based on Kimberly's removal petition was a reasonable one. Dr. Hynan testified that Kimberly's removal petition had played a significant part in his evaluation. Additionally, Dr. Hatcher testified that he also had considered Kimberly's removal petition.

With the parties being equal as to all of the above statutory factors, the trial court looked to other relevant factors. One factor was the fact that Kira is both African-American and Caucasian and that, as an African-American woman, Kimberly could provide Kira with a "breadth of cultural knowledge" as to her African-American heritage. The trial court noted that Kira would have to learn to exist as a biracial woman in a society that is sometimes hostile to such individuals and that Kimberly would be better able to provide for Kira's emotional needs in this respect. The trial court believed that this factor tipped the scale slightly in Kimberly's favor, and it awarded Kimberly sole custody of Kira.

The dissent contends that racial status was an improper factor for the trial court to consider. The cold reality is that no one can put blindfolds on in this case. Christopher is Caucasian, Kimberly is African-American, and Kira is biracial. Illinois case law provides that race may be considered, but that it may not outweigh all of the other relevant factors. Even Christopher conceded as much during the oral arguments this court held. In *Fountaine v. Fountaine,* 9 Ill.App.2d 482, 486 (1956), the Illinois Appellate Court, First District, reversed a custody determination

where the trial court had awarded sole custody of the children to the African-American father over the Caucasian mother. The court in *Fountaine* reasoned that the trial court had made its decision based solely on the fact that the children bore predominantly African-American physical characteristics. *Fountaine,* 9 Ill.App.2d at 484-85. The court further reasoned:

> "In passing upon the question of how the interests and welfare of the children will be best served, the court can and should take into consideration all relevant considerations which might properly bear upon the problem. However, we do not believe that the question of race alone can overweigh all other considerations and be decisive of the question. [Citation.] If this was the sole and decisive consideration on which the trial court based his decision, and it so appears from the record before us, we feel that his discretion was not properly exercised * * *." *Fountaine,* 9 Ill.App.2d at 486.

Several other Illinois courts have applied the holding in *Fountaine* to slightly different sets of circumstances. See *In re Custody of Russell,* 80 Ill.App.3d 41, 45 (1979); *Langin v. Langin,* 2 Ill.App.3d 544, 547 (1971). For example, in *Russell,* the Appellate Court, Fifth District, reviewed a custody determination where the trial court had awarded custody of the parties' minor son to the father over the mother. *Russell,* 80 Ill.App.3d at 44-45. In making its determination, the trial court had relied in part on the fact that the mother faced potential social problems due to her interracial marriage to an African-American man. *Russell,* 80 Ill.App.3d at 44. However, the trial court also considered a handful of other factors, such as the mother's

emotional problems, the instability of the mother's marriage, and the fact that the mother did not have concrete child care plans in place. *Russell,* 80 Ill.App.3d at 44. In affirming the trial court, the *Russell* court reasoned:

> "We have no doubt, after reviewing the record, that the court took into consideration all relevant factors and did not allow the matter of race alone to overweigh all other considerations and did not regard the racial factor as decisive. [Citations.] Instead, the court simply acknowledged that social pressures could develop that would be difficult or detrimental for [the child]." *Russell,* 80 Ill.App.3d at 45.

Illinois case law is in line with a United States Supreme Court case, *Palmore v. Sidoti,* 466 U.S. 429, 80 L.Ed.2d 421, 104 S.Ct. 1879 (1984). In *Palmore,* the Supreme Court reviewed an award of custody of a Caucasian child to the Caucasian father over the Caucasian mother, who had remarried an African-American man. *Palmore,* 466 U.S. at 431-32, 80 L.Ed.2d at 425, 104 S.Ct. at 1881. The Supreme Court determined that the custody award was unconstitutional, not because the trial court considered race, but because the trial court considered *solely* race. *Palmore,* 466 U.S. at 432, 80 L.Ed.2d at 425, 104 S.Ct. at 1881. Indeed, the Supreme Court was careful to premise its holding with the following statement: "But that court was entirely candid and made no effort to place its holding on any ground other than race." *Palmore,* 466 U.S. at 432, 80 L.Ed.2d at 425, 104 S.Ct. at 1881.

Volumes of cases from other jurisdictions have interpreted *Palmore* as not prohibiting the consideration of race in matters of child custody. See, *e.g., J.H.H. v. O'Hara,* 878 F.2d 240, 245 (8th Cir.1989) (declining to read *Palmore* as

"a broad proscription against the consideration of race in matters of child custody"); *Drummond v. Fulton County Department of Family & Children's Services,* 563 F.2d 1200, 1204-06 (5th Cir.1977) (*en banc*) (determining that use of race as merely one factor in making adoption decisions is constitutional), *cert. denied,* 437 U.S. 910, 57 L.Ed.2d 1141, 98 S.Ct. 3103 (1978); *Tallman v. Tabor,* 859 F.Supp. 1078 (E.D.Mich.1994) (holding that race can be considered in determining custody so long as race is not the sole consideration); *In re Davis,* 502 Pa. 110, 125-39, 465 A.2d 614, 621-29 (1983) (holding that trial court should have considered race as a factor in making foster placement decision); *Farmer v. Farmer,* 109 Misc.2d 137, 144-45, 439 N.Y.S.2d 584, 588 (1981) (stating that "the general rule appears to be that race is simply one factor among many others which should be considered in determining what is in the child's best interest"). Indeed, it appears that so long as race is not the sole consideration for custody decisions, but only one of several factors, it is not an unconstitutional consideration. The dissent grossly misinterprets the holding of *Palmore* and ignores its progeny.

In this case, Kira's racial status did play a role in the trial court's decision to award custody to Kimberly. However, contrary to the dissent's contention, it was not the sole factor. In fact, the dissent unfairly characterizes the trial court's opinion as insinuating "that only an African-American person can properly raise a biracial child in this society." Slip op. at 50. There were many components besides race that factored into the trial court's decision.

The trial court heard evidence from Kimberly as to how she would teach Kira about African-American culture.

In particular, Kimberly hoped to teach Kira about African-American expressions, the African-American way of moving, African-American celebrations, and African-American family relationships. Kimberly also wanted to teach Kira how to cope with being a woman of color. However, the ability to provide Kira with an atmosphere rich in traditions from her African-American heritage was not the sole factor nor the primary factor considered by the trial court. In fact, the trial court stated that it did not believe in a "broad stroke" approach that would award custody to Kimberly solely because she is African-American. The trial court carefully considered and appropriately weighed the eight requisite statutory factors, along with Kira's cultural background. As such, there is no basis in the record to determine that the trial court's custody determination was against the manifest weight of the evidence. It is obvious from the manner in which the trial court painstakingly laid out all of its reasons for awarding custody of Kira to Kimberly that this was a very difficult decision for the trial court. There was evidence in favor of Kimberly being granted custody and evidence in favor of Christopher being granted custody.

Christopher complains that the trial court did not give enough credence to the opinions of Dr. Hynan and Dr. Hatcher, the only two experts qualified to give opinions as to which parent should be awarded custody. However, it is well-settled law that it is the trial judge, not the expert witness, who is the trier of fact. See *Cerveny v. American Family Insurance Co.*, 255 Ill.App.3d 399, 407 (1993); *People v. Columbo*, 118 Ill.App.3d 882, 938 (1983). The trier of fact is not bound to accept the opinion of an expert on an ultimate issue (*In re J.H.*, 153 Ill.App.3d 616, 631 (1987); *Piano v. Davison*, 157 Ill.App.3d 649, 675 (1987)),

which in this case is which parent should be awarded custody of Kira. Prohibiting a trier of fact from rejecting an expert's opinion on an ultimate issue would usurp the role of the trier of fact. *People v. Campos,* 227 Ill.App.3d 434, 448 (1992).

The only recognized exception to the above rule applies when the expert's testimony pertains to "issues 'beyond the understanding of a lay person,'" such as medical testimony in a medical malpractice case. *Morus v. Kapusta,* 339 Ill.App.3d 483, 492 (2003), quoting *Davison,* 157 Ill.App.3d at 675. Certainly, deciding what is in the best interest of a child is within the average understanding of a lay person. Although expert testimony may be helpful to the trial court in determining which parent should get custody, it is not required. The trial court is perfectly capable of weighing the appropriate factors and making this determination on its own.

Our Illinois Supreme Court has eloquently explained the role of the trial court:

> "The weight accorded expert testimony must be decided by the trier of fact. [Citation.] Even if several competent experts concur in their opinion and no opposing expert testimony is offered, it is still within the province of the trier of fact to weigh the credibility of the expert evidence and to decide the issue. [Citation.] However, the uncontradicted and unimpeached opinion of an expert cannot be rejected arbitrarily. [Citations.] An opinion of an expert is to be accorded such weight that, in light of all of the facts and circumstances of the case, reasonably attaches to it. [Citation.]" *In re Glenville,* 139 Ill.2d 242, 251 (1990).

The dissent charges the trial court with "incorrectly disregard[ing] the notable expertise" of Dr. Hynan and Dr. Hatcher. Slip op. at 48. The dissent fails to understand the role of the trier of fact. The trial court here was not bound to accept Dr. Hynan's and Dr. Hatcher's opinions on which parent should be awarded custody of Kira. To require the trial court to do so would virtually eliminate the trial court's responsibility. The record reveals that the trial court did afford consideration to Dr. Hynan's and Dr. Hatcher's opinions. However, after giving Dr. Hynan's and Dr. Hatcher's opinions due consideration, the trial court was free to reject them or place little weight on them in light of other evidence. Much of Dr. Hynan's and Dr. Hatcher's testimony was called into question. Both Dr. Thomas and Dr. Alexander disagreed with Dr. Hynan's and Dr. Hatcher's methods in scoring Kimberly's personality tests. Additionally, Dr. Thomas disagreed with Dr. Hynan's and Dr. Hatcher's concerns about Kimberly's preference for nonconventional health care. Finally, Dr. Hynan's and Dr. Hatcher's opinions that Christopher would be the better parent to foster a relationship with the other parent was controverted by Kimberly's testimony that she believes that it is important for Kira to have a relationship with Christopher. Kimberly demonstrated her belief by withdrawing her removal petition and moving her mother to Illinois. Notably, Christopher never testified as to his desire to promote a relationship between Kira and Kimberly.

Finally, the dissent criticizes this decision, claiming it is based on a slanted presentation of "pseudo-facts" and speculation. Slip op. at 52. However, none of the facts that the dissent recites as being overlooked would merit a different result. This opinion is clearly replete with pages

of facts that favor both sides. Obviously, not every single iota of testimony can be included in this decision. Furthermore, any "speculations" (Slip op. at 52) that the dissent refers to are actually logical inferences drawn from facts recited.

III. CONCLUSION

The evidence in this case was closely balanced and the decision to award custody of Kira to Kimberly was no doubt a very difficult one for the trial court. Oftentimes the trial court is left with having to choose between two less than desirable parents. But in this case, the trial court was faced with two good parents, each of whom is capable of raising Kira. The collective testimony and exhibits depict Kimberly and Christopher almost evenly. After sifting through the relevant factors, however, the trial court found that Kimberly was the parent who could ever so slightly better contribute to Kira's overall well-being. Giving the trial court due deference, a reasonable person cannot possibly find that the trial court's custody determination is against the manifest weight of the evidence. As such, we must affirm the custody determination of the trial court.

For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

Affirmed.

JUSTICE BYRNE, specially concurring:

I agree with the conclusion reached in the opinion of the court; however, my road to that end is different to such a degree that I feel compelled to express why I believe that the trial court's judgment should be affirmed.

In reaching its conclusion, this court accepts Dr. Thomas's conclusion that the mother should have custody. I believe that the court's acceptance of Dr. Thomas's opinion is improper. Dr. Thomas was one of four expert witnesses certified by the trial court. Of these four witnesses who were certified to give opinions in the case, one, Dr. Hynan, was the court's neutral witness; the other three expert witnesses, Drs. Alexander, Hatcher, and Thomas, were controlled experts chosen by the mother. Although the trial court found Dr. Thomas qualified to render her opinion concerning the testing methods employed as applied to African-Americans, it found her not qualified to offer an opinion concerning custody.

Drs. Hynan and Hatcher performed the tests on each of the parties and concluded that the father was the preferred custodian. Their opinions were in large part based on the results of these tests. Dr. Thomas, as well as Dr. Alexander, criticized the testing methods employed by Drs. Hynan and Hatcher and questioned the accuracy of the results. Both Drs. Thomas and Alexander were critical of the testing process because they stated that the tests, as given and interpreted, were probably not accurate as applied to African-Americans, who require analyses different from those used by Drs. Hynan and Hatcher. Further, the bulk of Dr. Thomas's testimony concerned the subject of race. While the trial court found her not qualified to render an opinion concerning custody, she nevertheless came to the conclusion that the mother should have custody because the child is biracial and a female. Because her conclusion as to custody was not admissible at trial, I believe that the majority had no right to accept it in affirming the trial court's judgment.

I note also that, aside from Dr. Thomas's opinion regarding custody, there was no competent expert witness opinion that the mother should have the child. Dr. Alexander never rendered an opinion as to who should have custody, although he was qualified to express an opinion, and Drs. Hynan and Hatcher favored the father.

If I thought that the trial court based its conclusion as to custody in any manner as espoused by Dr. Thomas, I would not support that result. As the dissent states, it has long been the law that custody based solely on race is an impermissible exercise of the court's discretion. See *Fountaine v. Fountaine,* 9 Ill.App.2d 482, 486 (1956). I agree with the dissent that, had the court used race as the sole consideration in its analysis, it would have erred. However, I do not think race was the sole factor here.

This court cites *In re Glenville,* 139 Ill.2d 242 (1990), for the proposition that the trial court is free to determine the weight to be given to expert testimony. I believe that the trial court gave little weight to the expert conclusions of Drs. Hynan and Hatcher as to who should have custody, based on Drs. Thomas's and Alexander's criticism of their testing methods and analyses. The court then analyzed the myriad of nonexpert testimony offered by both parties consistent with the requirements of the statute (see 750 ILCS 5/602(a) (West 2004)), and found that a preponderance of the evidence favored the mother.

This was a long and complicated trial with many witnesses. The trial judge's memorandum opinion expressed the difficulty he had in arriving at a decision in a case as close as this one, where there were so many positives for each parent and, aside from certain eccentricities, no real negatives. While I support the result

reached by this court, I do so for my own reasons. I hope that the parties will be able to work together to raise their daughter, both contributing their special heritages and personalities to the best of their abilities.

JUSTICE McLAREN, dissenting:

I respectfully dissent, because I am of the opinion that this court's disposition does not accurately reflect the facts contained in the record. I disagree with numerous portions of the court's opinion, as to both the facts reported and its conclusions of law. The court's recitation of facts is slanted toward the proposition that Kimberly should have been awarded custody, by including only the facts that support its conclusion. Despite the expansive statement of the facts in the court's opinion, it does not contain all of the facts necessary for a fair and impartial review of the trial court's judgment.

This dissent will focus on the trial court's fundamental errors, while commenting on a few of this court's errors.

TRIAL COURT'S ERRORS

The trial court's rulings concern mixed issues of law and fact. A mixed question of law and fact is reviewed under the clearly erroneous standard. *Knorst v. State Universities Civil Service System,* 325 Ill.App.3d 858, 861 (2001). The clearly erroneous standard of review lies between the manifest weight of the evidence standard and the *de novo* standard and, as such, it grants some deference to the decision. *AFM Messenger Service, Inc. v. Department of Employment Security,* 198 Ill.2d 380, 392 (2001). "[W]hen the decision * * * [is of] a mixed question of law and fact, the * * * decision will be deemed 'clearly

erroneous' only where the reviewing court, on the entire record, is 'left with the definite and firm conviction that a mistake has been committed.'" *AFM Messenger,* 198 Ill.2d at 395, quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 92 L.Ed. 746, 766, 68 S.Ct. 525, 542 (1948); see *Moss v. Department of Employment Security,* 357 Ill.App.3d 980, 984-85 (2005); *Quinlan v. Stouffe,* 355 Ill.App.3d 830, 836 (2005).

A court generally seeks an expert's opinion to assist it in making a custody determination, and a court cannot disregard medical testimony that is not countervailed by other competent testimony. *In re Violetta B.,* 210 Ill.App.3d 521, 535 (1991). The trial court cannot second-guess an expert's opinion, without basis. To do so would be contrary to the evidence before the court. The best interest of the child is the paramount consideration, and qualified and competent medical testimony concerning the child for whom the custody decision is being made must not be disregarded when determining what is in that child's best interest. *In re C.B.,* 248 Ill.App.3d 168, 179 (1993). Both Dr. Hynan and Dr. Hatcher, who were certainly experts qualified to opine as to the best interest of Kira, did render opinions regarding the health, and possible medical, concerns for Kira if Kimberly were to be awarded custody. Both experts recommended that Christopher be awarded custody of Kira, without condition or similar concerns for Kira if Christopher had custody.

It is important to know that Dr. Hynan and Dr. Hatcher rendered specific opinions as to why Kimberly should not be awarded sole custody. They could not have been more clear. As a result of their testing, interviews, and consideration of a plethora of professional factors, both doctors offered similar reasons for their opinions that

Christopher be awarded custody. Both doctors recited their concerns with Kimberly's ability to fully and properly attend to Kira's mental and physical needs, including possible medical needs, because of Kimberly's particular personality type, which included impulsivity, narcissism, difficulties with authority, and problems with frustration tolerance. Both doctors questioned Kimberly's ability to openly promote the relationship between Kira and Christopher. Neither doctor found any significant concerns about Christopher. (Also, this court fails to mention that Dr. Hynan was concerned with the effect that Che, Kira's half brother, might have on Kira because of Che's reported psychological difficulties, including the report of Che's threatened suicide.)

Evidence of the erroneous findings first comes to light by a review of the trial court's opinion letter. The trial court's six-page letter of opinion sets forth reasons for disregarding the opinions of both its *own* expert witness, Dr. Hynan, and *Kimberly's* chosen expert witness, Dr. Hatcher.

> "The Court has reviewed their [Drs. Hynan's and Hatcher's] written reports and listened closely to their testimony and concludes that the primary basis of that opinion was the pendency at the time they did their evaluation[s] of a Petition then on file by [Kimberly] to remove Kira from the State of Illinois and relocate her to North Carolina. Each of those experts acknowledged that that factor weighed heavily in [his] opinion, and each acknowledged that the fact that the Petition has been withdrawn by [Kimberly] would affect the weight to be given to that factor in the basis of their opinions."

However, the record clearly indicates that the trial judge was incorrect when he wrote that critical portion of his opinion letter. The report of proceedings indicates that at the close of the first day of Dr. Hynan's testimony, the *trial court* itself asked Dr. Hynan: "Dr. Hynan, would your opinion relative to custody be any different had removal not been an area that you looked into at the time that you did your evaluation?" Dr. Hynan answered: "It would not be any different." Similarly, the report of proceedings from another trial day indicates that Dr. Hatcher was asked by Christopher's attorney: "Did your opinion rest in any part on the issue of removal?" Dr. Hatcher answered: "No. The issue had been settled." This testimony alone illustrates that the trial court's ultimate custody decision was mistaken, when reviewed under the clearly erroneous standard, because the court incorrectly weighed the testimony by incorrectly factoring nonexistent impeachment of the reasons for the doctors' custody opinions. This court's opinion inexplicably fails to consider the trial court's improper factoring, and it compounds the problem because it relies upon the trial court's erroneous statements in affirming the judgment.

There is substantial material and unimpeached evidence in the record to rebut the assertion that Dr. Hynan's and Dr. Hatcher's custody opinions and recommendations favoring Christopher were based "primarily" upon Kimberly's removal petition. Dr. Hynan's December 3, 2004, seven-page, single-spaced rebuttal report, done at the court's request, is replete with specific reasons, information, test result comments, and an item-by-item rebuttal to the assertions and opinions of Dr. Alexander and Dr. Thomas. Notably, the report concludes with Dr. Hynan's remarks that the recommendation in his February 19,

2004, report, which recommended that custody be awarded to Christopher, "[does] not change at all after a review of [Drs. Alexander's and Thomas's] reports." Both of Dr. Hynan's reports contain extensive, specific details supporting his custody opinion. Consistent with the record, Dr. Hynan's two written reports dispel the conclusion that Dr. Hynan based his custody opinion primarily or solely upon Kimberly's removal petition. Both Drs. Hynan and Hatcher stated that the removal petition was indicative of the likelihood that Kimberly would not foster a strong relationship between Christopher and Kira, but was not the sole basis for their custody opinions.

Dr. Hatcher's rebuttal report, also done at the request of the court, supported his original custody opinion that Christopher should be awarded custody of Kira, and it responded to the reports of Drs. Alexander and Thomas. A portion of the rebuttal report is representative of its contents.

> "Dr. Thomas'[s] report essentially opined that I did not properly consider the psychological test results in light of the parties being involved in a custody evaluation, corroborative information regarding personality traits measured on the test, and the ethnicity of Kim Woodson. I disagree. I did, in fact, consider all of those factors in my deliberations and they helped form my opinion in the 604.5 custody report."

The importance and role of the local mandatory divorce evaluation rule, local court rules 15.18(A)(1) and (2) (18th Judicial Cir. Ct. R.15.18(A)(1) and (2) (eff. March 1, 1998)), which had produced a professional custody opinion, was virtually cast aside by the court's ruling based upon an incorrect finding of fact.

It was error for the trial court to incorrectly disregard the notable expertise, exhaustive analysis, and extensive custody evaluation reports and testimony of Dr. Hatcher and Dr. Hynan and other evidence in the record in awarding Kira's custody to Kimberly.

In the trial court's opinion letter, the court said, "this case is exceedingly close on the issue of custody."

However, the court did not look to the extensive reports and testimony of its own custody expert witness or Kimberly's custody expert witness. Considering that the court determined that the case was exceedingly close and improperly discounted the substantial evidence of the expert's preference in favor of the father, it logically follows that a different result would have occurred if the trial court had not improperly discounted and failed to consider the expert evidence.

Additionally, the trial court erred in basing its custody award on race. If the trial court disregarded the opinions of Drs. Hynan and Hatcher, as it did, upon what information or opinions did the trial court rely? The only references to race were contained in the limited testimony of Dr. Alexander and Dr. Thomas. The court had limited the opinions of Dr. Alexander and Dr. Thomas to matters of impeachment of the other experts' testing techniques. The court stated that it would not consider their testimony relative to substantive custodial recommendations, because they had virtually no experience with child custody evaluations, custody opinions, or even the statutory guidelines for determining custody. Both those experts testified about the general effects of raising a child of color in this society, with Dr. Thomas's testimony being based primarily upon literature that she, herself, authored. Even

though Dr. Alexander had not interviewed Christopher or Kira, he rendered an opinion (negatively) about Christopher anyway.

Both Drs. Alexander and Thomas offered only general critiques about the tests that Drs. Hynan and Hatcher had done. The criticisms amounted to inaccurate comments that Drs. Hynan and Hatcher should have considered the race and circumstances of the parties when they conducted their tests. Although the trial court barred Kimberly's two controlled witnesses from offering opinions about the best interest or custody of Kira, the court's letter of opinion clearly referenced and deferred to their testimony about Kimberly's greater ability to raise a biracial child. Immediately after stating that it would not use race as the determinative factor, as Dr. Alexander and Dr. Thomas suggested be done, the court, in the next sentence of the opinion letter, stated:

> "However, it is true that [Kimberly] will be able, if awarded custody, to provide Kira with a breadth of cultural knowledge and experience that [Christopher] will not be able to do. Kira will have to learn to exist as a biracial individual in a community and society that is sometimes hostile to such an individual."

The following paragraph of the court's opinion letter states:

> "The Court finds each of the parties to be fit and proper persons to be awarded her custody and to exercise full visitation and parenting rights but awards custody to [Kimberly] based on her slightly better ability to provide for the emotional needs of the child which may be occasioned by her special circumstances as discussed above

> [her ability to provide a breadth of cultural knowledge and experience to help Kira learn to exist as a biracial individual]."

I believe that these words can be read to mean only that the trial court awarded custody to Kimberly solely on the premise that she was an African-American person who will be able to provide Kira with a breadth of cultural knowledge and experience that Christopher could not, due to his race. Despite this court's weak protest to the contrary, the remarks in the trial court's letter of opinion show that the court's decision for custody improperly hinged on the sole factor of race: that only an African-American person can properly raise a biracial child in this society.

An award of custody based solely on race is impermissible, as an improper exercise of a trial court's discretion. *Fountaine v. Fountaine,* 9 Ill.App.2d 482, 486 (1956). The United States Supreme Court has also specifically rejected the consideration of racial biases, or the effects of racial prejudice and classifications, in child custody matters as a violation of the equal protection clause of the United States Constitution (U.S.Const., amend. XIV). *Palmore v. Sidoti,* 466 U.S. 429, 432, 80 L.Ed.2d 421, 425, 104 S.Ct. 1879, 1881-82 (1984). Thus, the trial court here erroneously used race as its basis for awarding custody.

Finally, the trial court erred in allowing in any capacity the opinion testimony of both Dr. Alexander and Dr. Thomas. Dr. Hynan and Dr. Hatcher, the experts with the stipulated expertise in rendering custody opinions, refuted the race and gender opinions that Dr. Alexander and Dr. Thomas rendered while attacking Drs. Hynan's and Hatcher's testing, evaluations, and custody recommendations. Both Dr. Hynan and Dr. Hatcher testified that the

bases for the opinions offered by Dr. Alexander and Dr. Thomas had no validity or known acceptance of any kind within their scientific field. Accordingly, the opinions rendered by Dr. Alexander and Dr. Thomas did not meet the *Frye* test. See *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923). In Illinois, the admission of expert testimony is governed by the standard first expressed in *Frye. In re Commitment of Simons,* 213 Ill.2d 523, 529 (2004); *Donaldson v. Central Illinois Public Service Co.,* 199 Ill.2d 63, 76-77 (2002).

Commonly called the "general acceptance" test, the *Frye* standard dictates that scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye,* 293 F. at 1014. In this context, "general acceptance" does not mean universal acceptance, and it does not require that the methodology in question be accepted by unanimity, consensus, or even a majority of experts. *Simons,* 213 Ill.2d at 530. Instead, it is sufficient that the underlying method used to generate an expert's opinion is reasonably relied upon by experts in the relevant field. *Simons,* 213 Ill.2d at 530. Significantly, the *Frye* test applies only to "new" or "novel" scientific methodologies. *Simons,* 213 Ill.2d at 530. "Generally, however, a scientific technique is 'new' or 'novel' if it is 'original or striking' or does 'not resembl[e] something formerly known or used.'" *Donaldson,* 199 Ill.2d at 79, quoting Webster's Third New International Dictionary 1546 (1993).

Drs. Alexander's and Thomas's opinions should have been admitted only if their methods were sufficiently established to have gained general acceptance in the particular field in which they belong. Because their methods were not

affirmatively shown to be generally accepted in the field of child custody, their opinions should not have been considered by the trial court. *Frye,* 293 F. 1013. This court cites *Snelson v. Kamm,* 204 Ill.2d 1 (2003), for the proposition that, if a party does not request a *Frye* hearing, the party has waived the *Frye* issue on appeal. I believe that the holdings of *Snelson* do not apply to the mixed questions of fact and law in this case. See *Quinlan,* 355 Ill.App.3d at 836. Also, Christopher did obtain a hearing on his motion to bar the testimony of Dr. Thomas, for reasons consistent with *Frye* (and *In re Marriage of Jawad,* 326 Ill.App.3d 141 (2001)). The court granted Christopher's motion in part, and it allowed Dr. Thomas to testify only about the testing techniques of Drs. Hynan and Hatcher. Also, even if a party's inaction constitutes a waiver of an issue, the party's waiver does not limit our own jurisdiction. *Carlson v. City Construction Co.,* 239 Ill.App.3d 211, 243 (1992). I believe that the *Frye* objection remains. The trial court not only abused its discretion in allowing such unprecedented testimony; it later improperly based its decision on evidence that it said it would not consider for that purpose.

APPELLATE COURT'S ERROR

This court's opinion misses the basic issues in its presentation, which includes a lengthy array of pseudo-facts, used to shore up support for its conclusions. The court even inserts its own speculations and conclusions as fact. For example, "The trial court *apparently* found Dr. Hatcher's and Dr. Hynan's testimony to be slightly impeached * * *." (Emphasis added.) Slip op. at 35. Also, "Dr. Thomas's knowledge, experience, education, and skill * * * *undoubtedly aided* the trier of fact in understanding the evaluations * * *." (Emphasis added.) Slip op. at 29. The

trial court referenced only the removal petition as a basis for disregarding Dr. Hynan's and Dr. Hatcher's custody opinions. There is nothing of record that indicates that the trial court believed that Dr. Hynan or Dr. Hatcher was impeached by the "novel" opinions of Drs. Thomas and Alexander.

This court notes that the *Frye* test applies only to principles that are new or novel. But the court then again employs its unsupported speculations and conclusions to exclude Dr. Thomas's testimony from having to meet the *Frye* test: "Furthermore, *we do not believe* that the admission of Dr. Thomas's testimony offended the principles espoused in *Frye. Dr. Thomas's opinions were not based on new or novel methods.*" (Emphasis added.) Slip op. at 29. There is nothing in the record to suggest that the bases for the opinions of Dr. Alexander and Dr. Thomas were anything but novel, at best, and racist, at worst.

CONCLUSION

Because the record clearly shows that the trial court's findings were against the manifest weight of the evidence, and that the trial court made errors of law, the record compellingly calls for reversal of the trial court's custody award to Kimberly, and for the award of Kira's custody to Christopher as being in Kira's best interest.

United States of America

2-05-0971

In re MARRIAGE OF
CHRISTOPHER M. GAMBLA,

Petitioner-Appellant,

v.

KIMBERLY K. WOODSON,

Respondent-Appellee.

State of Illinois,)
Appellate Court,) **ss.**
Second District,)

I, ROBERT J. MANGAN, Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the decision of the said Appellate Court in the above entitled cause of record in my said office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this 31st *day of* July, *A.D. 20*06.

/s/ Robert J. Mangan
Clerk Appellate Court, Second District

APPENDIX B

CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DuPage County, Illinois

505 N. County Farm Road
Wheaton, Illinois 60187-3907

C. STANLEY AUSTIN
Associate Judge

[LOGO]

August 23, 2005

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RE: *In Re. The Marriage of Christopher M. Gambla and Kimberly Woodson*
DuPage County Case No. 03 D 1116

Dear Counsel:

Please consider this correspondence to be my Letter of Opinion with regard to the above-referenced matter. As you know, this matter proceeded to trial over a period of 17 court days this past summer. The primary contested issue was that of custody of the parties' minor daughter, Kira Gambla. The Court heard testimony from the parties, four expert witnesses, namely Dr. Daniel Hynan, Dr. Roger Hatcher, Dr. Anita Thomas, and Dr. Charles Alexander, a

treating counselor named Larry Shulman, and occurrence and character witnesses including Arline Gambla, Anthony Morello, and Rajkumar Rambhajan on behalf of the Petitioner, and Linda Dorsey, Donna Stevens, Kate Evans, and Marion Cook on behalf of the Respondent. In arriving at a decision, the Court has considered the testimony of the above-named witnesses, all Exhibits admitted into evidence, and the statutory factors to be considered when determining custody as contained in 750 ILCS 5/602 of the Illinois Marriage and Dissolution Act.

Let me preface this ruling by stating how difficult a decision this has been for the Court. In many respects, this case is a tragic one, not tragic in the sense that Kira is in any sort of physical or emotional danger were her custody to be placed with either parent, but tragic in the classical Greek tragedy sense in that people, in this case, the Petitioner and Respondent who are in all other respects good, decent and honorable people, suffer from a fatal character flaw which results in misery being brought into their lives. In this case, that fatal flaw is their unwillingness and inability to settle their own differences, adjust their own personal approaches to parenting and interaction with each other, and put the best interest of this child first. As a result, countless hours of time, vast sums of money, and untold emotional heartache have been engendered in this case. This is a case that cries out for joint custody because both parents love their daughter, are willing and able to provide for her care, and are in all respects good parents. Because Kira is a biracial child, her best interests would be best achieved by the parties working cooperatively to promote a sense of pride in her racial diversity and to jointly work to protect her from the sometimes cruel nature of the way society can treat people

based on their race. This case could be an example of racial harmony and promotion of pride in ethnic diversity that would benefit Kira. But because of the inability and unwillingness of Mr. Gambla and Ms. Woodson to act cooperatively on her behalf, such will not be the case. The Illinois Marriage and Dissolution of Marriage Act requires the Court to consider an award of joint custody and the Court has done so. The Court has taken into account the fact that neither party has asked for joint custody, and the expert witnesses' testimony that joint custody is not recommended in this case, along with this Court's impression of the testimony elicited from both parties, and based upon all of the foregoing, the Court will not enter an order for joint custody of Kira.

Thus, the Court is left with the very difficult task of assessing the parties' respective claims for sole custody in light of the statutory factors contained in Section 5/602 of the Marriage and Dissolution of Marriage Act. Each of the listed factors shall be considered in turn.

First, as to the wishes of the child's parent or parents to her custody, as all of the experts testified, and as the Court personally observed, both parties wish to be awarded the sole custody of Kira. The Court finds each party's request to be well founded and well intended.

Second, with regard to the wishes of the child as to her custody, given Kira's young age, she is unable to express her wishes relative to her custody, though the Court notes parenthetically that by all accounts of all of the witnesses both professional and lay, she loves both of her parents and is happy when she spends time with each of them.

Third, as to the interaction and interrelationship of the child with her parents, her siblings and any other persons who may significantly affect her best interests, the Court again finds, based upon the testimony both of the psychologists who evaluated this case and the lay witnesses who testified about Kira's relationship with both of her parents, Kira to have a loving relationship with each of her parents. In addition, the Court finds that she has an appropriate, loving relationship with her stepbrother Che, when she is with the Respondent, and she has a loving appropriate, relationship with her cousins with whom she lives when she spends time with the Petitioner. In addition, there is no indication that she has anything other than a loving relationship with her grand parents, her aunts and uncles and all other family members with whom she comes in contact. In short, she is a loving child who loves her relatives in addition to her parents and who, by all accounts, is loved by each of them as well.

Fourth, as to Kira's adjustment to her home, school, and community, there is no indication from the evidence that Kira has any difficulty in the home environment when she resides with her Father in her grandparents home nor when she resides with her Mother at her Mother's apartment. If there is any difficulty in the adjustment that she has had, it is in connection with the uncertainty which necessarily has flowed from this custody conflict, and efforts by the Court to minimize conflict while the case is pending.

Fifth, as to the mental and physical health of all individuals involved, there is no indication, professionally or otherwise, that either of the parties suffer from any mental or physical maladies that would preclude them from parenting their daughter. Clearly, the evidence

showed that each has an entirely different parenting approach, outlook on life, and feelings about what is best for Kira, but the Court finds that there is no evidence to suggest that those differences are rooted in a mental, physical or psychological issues which pose a risk to Kira. To the extent that either party had any elevations on psychological tests administered to them, the Court finds these elevations insignificant and irrelevant to their ability to parent Kira.

As to the sixth and seventh factors, physical violence or the threat of physical violence, or the occurrence of ongoing abuse, the Court is not convinced that there has been any violence or threat of violence directed by either party against the other. To the extent that there have been incidents of conflict, the Court finds them to have been verbal or written in nature a vast majority of the time, and the Petitioner's attempt to convince the Court that the Respondent has been physically violent towards him was unpersuasive.

The final statutory factor contained in Section 5/602 of the Marriage and Dissolution of Marriage Act involves the willingness and ability of each party to facilitate and encourage a close and continuing relationship between the other parent and the child. Each party gave significant lip service to their willingness to do so, but there certainly have been problems in doing so during the pendency of this case. The Court finds those difficulties to have arisen out of the on going inability of the parties to be willing to compromise and communicate, not out of any inherent inability of either party to facilitate that relationship. The Court is aware that both Dr. Hynan and Dr. Hatcher have opined that it is in Kira's best interest that her custody be awarded to the Petitioner, primarily, though not exclusively,

based upon their opinion that he is the one most able to foster and encourage a close relationship with the other party. The Court has reviewed their written reports and listened closely to their testimony and concludes that the primary basis of that opinion was the pendency at the time they did their evaluation of a Petition then on file by the Respondent to remove Kira from the State of Illinois and relocate her to North Carolina. Each of those experts acknowledged that that factor weighed heavily in their opinion, and each acknowledged that the fact that the Petition has been withdrawn by the Respondent would affect the weight to be given to that factor in the basis of their opinions. As can been [sic] seen by a review of the above, this case is exceedingly close on the issue of custody. The only good news is that no matter which way the Court comes down on the award of custody, the child will be in good hands and will be properly cared for. The efforts by both parties to somehow portray the other as an unfit or uncaring parent or a bad person has [sic] failed, in this Court's opinion. We are left with two loving, caring and able parents who can't agree on what to do with their daughter.

The Statute also requires the Court to consider all relevant factors in addition to those specifically enunciated in the Statute. The Respondent has asked the Court to consider the issue of race in making its award of custody. Her experts, Dr. Thomas and Dr. Alexander, though not making a formal recommendation as to custody, seemed to be testifying for the proposition that solely because the Respondent is African American and because Kira is a biracial child, her custody should be awarded to the Respondent. In this case, the Court finds no compelling reason to accept that broad stroke approach. However, it is true that the Respondent will be able, if awarded custody,

to provide Kira with a breadth of cultural knowledge and experience that the Petitioner will not be able to do. Kira will have to learn to exist as a biracial individual in a community and society that is sometimes hostile to such an individual. The Court believes that both parties are well intentioned when they say that they will attempt to expose Kira to all aspects of her ethnic heritage but there are some obvious limitations imposed upon both.

Having considered all of the foregoing and recognizing the closeness of this question, and given the fact the parties are unable to work together in a joint custodial arrangement, the Court awards sole custody of the minor child, Kira, to the Respondent, Kimberly Woodson. The Court finds each of the parties to be fit and proper persons to be awarded her custody and to exercise full visitation and parenting rights but awards custody to the Respondent based on her slightly better ability to provide for the emotional needs of the child which may be occasioned by her special circumstances as discussed above. The Petitioner is awarded extensive visitation rights with Kira but given the inability of the parties to communicate well about such matters, the Court will delineate a specific schedule as follows:

Until such time as Kira is enrolled in school, the parties will continue to share time with Kira on an alternating week basis as they are doing under the Temporary Order entered herein. Once Kira is enrolled and attending school, during the school year, the Petitioner will have alternating weekends with Kira from after school on Friday until Sunday at 6:30 p.m., and will have two periods of dinner visitation with Kira from after school until 6:30 p.m. each week on Tuesdays and Thursdays. The parties will alternate legal holidays and will alternate

spring vacation (break) on an annual basis and will split Christmas Vacation equally on an annual basis. During the summer, however, each party will have two non-consecutive one-week periods of uninterrupted vacation time with Kira and the balance of the summer will be split equally with Kira to be with each parent for one week periods subject to the other parent having Tuesday and Thursday dinner periods with Kira. In the event of any conflict of schedules, vacation time supercedes holiday time and both supercede regular visitation time.

As to the financial arrangements relative to Kira, the terms of the Trial Stipulation, paragraphs 3, 4, 5, 6 and 7 are adopted by the Court as Orders as part of the Judgment to be entered herein. As to the issue of child support, Mr. Gambla will pay as and for child support the sum of $1,500.00 per month to be paid by way of an Order of Support and Withholding Order. The Court finds this amount to be 20% of his net income. Post emancipation support shall be paid pursuant to Section 5/513 of the Illinois Marriage and Dissolution of Marriage Act.

With respect to the financial matters involving the parties, the Court finds each of the parties to be capable of providing for their own support, and that fact in addition to the very short duration of this marriage leads the Court to bar each of the parties from the receipt of maintenance one from the other.

As to the property allocation and other financial matters, the Court adopts paragraphs 2 (a-h), 8 and 9 of the Trial Stipulation as the resolution of all other financial matters involving the parties with the exception of attorneys' fees. As to the request by the Respondent for contribution to her fees, the Court has considered the original

Petition for Attorneys' Fees, the first and second amendments to that Petition and the Petitioner's Response and Motions to Strike relative to those Petitions. In addition, the Court has considered the financial positions of the parties and the statutory factors contained in Section 508(a) and 503(j) of the Illinois Marriage and Dissolution of Marriage Act. The Court has also considered the income and assets that the parties have and will have based on the Judgment to be entered herein, and based upon all the foregoing, the Court orders that the Petitioner will contribute to the Respondent's attorneys fees the sum of $25,000.00.

Finally, the Court finds as to the issue of grounds that irreconcilable differences have arisen between the parties which have caused the irretrievable breakdown of the marriage, that past attempts at reconciliation have failed, and future attempts will be impracticable and not in the best interest of the parties. The Court further finds the parties have resided separate and apart for a continuous period in excess of six months and by written stipulation have agreed to waive the statutory two-year waiting period for those grounds. Counsel for the Respondent is directed to prepare a Judgment and appropriate accompanying Orders incorporating the terms of this Letter of Opinion, submit it to counsel for the Petitioner for his review and approval, and present it to the Court on September 1, 2005 at 9:25 a.m. This matter has been placed on the Court's calendar for that purpose. The Court also wishes to thank all counsel for their efforts in presenting their client's positions to the Court in a clear and

concise manner which was of great assistance to the Court as it made this very difficult decision.

Very truly yours.

/s/ CS Austin
C. Stanley Austin
Presiding Judge
Domestic Relations Division

CSA:cds
Gamblaopinion

APPENDIX C

103291 **SUPREME COURT OF ILLINOIS**
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

November 29, 2006

Mr. Christopher M. Gambla
1325 Nagel Court
West Chicago, IL 60185

No. 103291 – Christopher M. Gambla, petitioner, v. Kimberly K. Woodson, respondent. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on January 4, 2007.

APPENDIX D

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

IN RE THE MARRIAGE OF	)	
CHRISTOPHER M. GAMBLA,	)	
Petitioner,	)	
and	)	NO. 03 D 1116
KIMBERLY WOODSON,	)	
Respondent.	)	

JUDGMENT FOR DISSOLUTION OF MARRIAGE

(Filed Sept. 1, 2005)

THIS CAUSE coming on for trial upon the petitioner's Petition for Dissolution of Marriage and the respondent's consolidated Petition for Dissolution of Marriage, and the petitioner, CHRISTOPHER M. GAMBLA, appearing in open court in his own proper person and by and through his attorney, James Hagler, Esq.; the respondent, KIMBERLY WOODSON, also appearing in open court in her own proper person and by and through her attorneys, Barbara Ann Corrigan, Esq. and Lyle B. Haskin, Esq., of Haskin & Corrigan, LLC; and the court having considering the testimony of all witnesses, including the petitioner and the respondent, (duly sworn and examined in open court) and all exhibits in support of the allegations contained in petitioner's Petition for Dissolution of Marriage and respondent's Response thereto (a certificate of evidence of same having been duly signed, sealed and filed in this cause); and the court having

considered all of the evidence and now being fully advised in the premises;

THE COURT FINDS:

1. It has jurisdiction of the parties hereto and of the subject matter hereof.

2. The parties are presently, and have been for more than ninety (90) days immediately preceding the entry of this Judgment for Dissolution of Marriage, actual residents of the County of DuPage, State of Illinois.

3. The parties were lawfully married to each other on May 11, 2002 in Atlanta, Georgia and the marriage is registered in DeKalb County, Georgia.

4. One (1) child was born to the parties, namely: Kira, born October 19, 2002, and presently two years old. No other children were born to, or adopted by the parties as a result of their marriage. The respondent is not pregnant. [Each party is a fit and proper person to be awarded custody of Kira and to exercise full visitation and parenting rights. /s/ CSA]

5. During the course of the marriage, irreconcilable difference arose between the parties, which caused an irretrievable breakdown of the marriage. Past attempts at reconciliation have failed, and future attempts at reconciliation would be impracticable and not in the best interests of the family. The parties have lived separate and apart for a period in excess of two (2) years.

6. The court conducted a full trial in this matter. After considering the testimony of all witnesses, including both parties, the exhibits offered and received into evidence, and the provisions of the Illinois Marriage and

Dissolution of Marriage Act ("IMDMA"), the court rendered its findings and rulings in a letter of opinion, dated August 23, 2005. Said letter of opinion provides for the resolution of all matters relating to the custody of the minor child, child support, and all matters related to the minor. The letter of opinion is attached hereto as **Exhibit "A,"** and incorporated by reference herein.

7. The parties entered into a Trial Stipulation, dated June 24, 2005, which resolves all issues related to the support and maintenance of the parties and to the parties' respective property rights and obligations. The Trial Stipulation is attached hereto as **Exhibit "B"** and is incorporated by reference herein.

THE court specifically finds that the petitioner has established by competent, material and relevant proof all of the allegations related to the grounds to dissolve the parties' marriage, and that the parties are entitled to a dissolution of their marriage.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, and this court, by virtue of the power and authority therein vested, and the statute in such cases made and provided, DOES ADJUDGE as follows:

A. That the bonds of matrimony existing between the petitioner, CHRISTOPHER M. GAMBLA, and the respondent, KIMBERLY WOODSON, be, and hereby are, dissolved, and the same are dissolved accordingly, and the marriage of the parties is terminated.

B. The court's letter of opinion, dated August 23, 2005, and all of its terms and provisions are hereby merged, incorporated into, and made a part of this Judgment for Dissolution of Marriage.

C. The parties' trial stipulation dated June 24, 2005, and filed in open court, is hereby merged, incorporated into, and made part of this Judgment for Dissolution of Marriage.

D. The sole custody, care, control and education of the minor child, Kira, is awarded to the respondent, KIMBERLY WOODSON. [Kimberly shall advise Christopher of Kira's health provider and appointments and sign authorizations for release of information to Christopher. The same shall be done regarding Kira's school.** /s/ CSA]

E. The petitioner, CHRISTOPHER GAMBLA, shall have visitation with the minor child, Kira, as follows:

1. Until such time as Kira is enrolled in, and attending ~~school~~ [Kindergarten,* /s/ CSA] the parties shall have Kira on an alternating week basis, ~~exchanging Kira at 6:00 p.m. each Friday evening.~~ [as they are doing under the temporary order entered on October 4, 2004, attached hereto as Exhibit "C," and incorporated herein. /s/ CSA]

2. Once Kira is enrolled in, and attending school, CHRISTOPHER GAMBLA will have visitation with Kira on alternating weekends from after school on Friday until Sunday at 6:30 p.m. and each Tuesday and Thursday evening from after school until 6:30 p.m.

[* or First Grade if Kira does not attend Kindergarten,

** as to health care, this provision shall not imply or permit Christopher to participate in Kimberly's right to make decisions as custodial parent. /s/ CSA]

3. During the summer, each party will have two (2) non-consecutive one (1) week periods of uninterrupted vacation time with Kira. For the balance of the summer, the parties shall have Kira on an alternating week basis, exchanging Kira at 6:00 p.m. each Friday evening and the other parent will have Kira each Tuesday and Thursday from 5:00 p.m. until 7:00 p.m. for dinner.

4. In the event of any conflict in schedules, vacation time supercedes holiday time and both supercede regular visitation time.

5. Holiday visitation will be alternated as follows:

HOLIDAY	EVEN-YEARS	ODD-YEARS
Martin Luther King Day	KIMBERLY	CHRISTOPHER
President's Day	CHRISTOPHER	KIMBERLY
Easter	KIMBERLY	CHRISTOPHER
Spring Break*	CHRISTOPHER	KIMBERLY
Mother's Day	KIMBERLY	KIMBERLY
Father's Day	CHRISTOPHER	CHRISTOPHER
Memorial Day	KIMBERLY	CHRISTOPHER
[Halloween	KIMBERLY	CHRISTOPHER s/ CSA]
Labor Day	CHRISTOPHER	KIMBERLY
Thanksgiving	KIMBERLY	CHRISTOPHER

1st Half of Winter Break*	**CHRISTOPHER**	**KIMBERLY**
2nd Half of Winter Break*	**KIMBERLY**	**CHRISTOPHER**
Christmas Eve	**CHRISTOPHER**	**KIMBERLY**
Christmas Day	**KIMBERLY**	**CHRISTOPHER**
[The Last Day of Kwanzaa, New Year's Eve/ and New Year's Day.	**CHRISTOPHER**	**KIMBERLY**

* Spring Break and Winter Break parenting time will begin when KIRA begins attending school.

Thanksgiving holiday shall be defined as the Wednesday evening before Thanksgiving, Thanksgiving Day, and the Friday, Saturday and Sunday immediately following Thanksgiving.

Upon the start of KIRA's schooling, the first half of Winter Break will commence on the first full day of the break from school. The second half of Winter Break will commence on the first full day of the second one-half (1/2) of the break from school. Christmas Eve holiday time will commence at 9:00 a.m. on December 24 and will end at 9:00 a.m. on December 25. Christmas Day holiday time will commence at 9:00 a.m. on Christmas Day and end at 8:00 p.m. on Christmas Day. In the event that either Christmas Eve or Christmas Day holiday time falls during the other parent's Winter Break time, the parties agree that the holiday time will take precedence

and they will cooperate in seeing that the parent who has the scheduled holiday time has KIRA with him or her at the aforementioned holiday times.

All remaining holiday visitation times will commence at 9:00 a.m. and will end at 6:00 p.m. and will include the accompanying weekend, where applicable.

[6. Each party shall have telephone visitation with Kira.* /s/ CSA]

F. CHRISTOPHER GAMBLA will pay to KIMBERLY WOODSON the sum of One Thousand Five Hundred Dollars ($1,500.00) per month as and for child support for the minor child, Kira, commencing upon entry of this Judgment. Said sum represents twenty percent (20%) of CHRISTOPHER GAMBLA'S net income. Said support is payable through the Clerk of the Circuit Court of DuPage County, pursuant to a Support Order and Order of Withholding. [The parties shall alternate the right to claim Kira as a dependency exemption. Kimberly shall have 2005 and all odd-numbered years. Christopher shall have 2006 and all even-numbered years. Both parties shall timely sign IRS Form 8332 so that the claiming party can file said returns on time. /s/ CSA]

G. The parties shall pay post-emancipation support pursuant to Section 5/513 of Chapter 750 of the Illinois Marriage and Dissolution of Marriage Act.

[* When that party is not in possession of Kira, said telephone visitation shall be facilitated by both parties and shall occur between 6:00 p.m. and 7:00 p.m. Central Time and shall be for a reasonable period of time. /s/ CSA]

H. Both parties are debarred from the receipt of maintenance.

I. CHRISTOPHER GAMBLA will pay to Haskin & Corrigan, LLC the sum of Twenty-five Thousand Dollars ($25,000.00) as and for his contribution to KIMBERLY WOODSON'S attorneys fees and court costs pursuant to Sections 508(a) and 503(j) of the Illinois Marriage and Dissolution of Marriage Act.

J. The petitioner and the respondent are ORDERED, DECREED, AND DIRECTED to execute and carry out all of the terms, provisions, and conditions of this Judgment for Dissolution of Marriage, the letter of opinion dated August 23, 2005, and Trial Stipulation dated June 24, 2005, which are incorporated herein and attached to this Judgment for Dissolution of Marriage.

K. Each of the parties shall execute, acknowledge, and deliver good and sufficient instruments necessary and proper to vest the title and estate in the respective parties hereto as provided in the said letter of opinion, dated August 23, 2005 and the Trial Stipulation dated June 24, 2005.

L. Any right, claim, demand, or interest of the parties in, and to, maintenance for themselves, whether past, present, or future, and in, and to, the property of the other, whether real or personal, and wherever situated, including but not limited to, homestead, succession, and inheritance, arising out of the marital relationship, or any other relationship, existing between the parties hereto, except as expressly set forth in the aforesaid letter of opinion, is forever barred and terminated.

M. The court retains jurisdiction of the subject matter of this cause and of the parties hereto for the purpose of enforcing the terms of this Judgment for Dissolution of Marriage and the terms and provisions of the court's letter of opinion, dated August 23, 2005 and Trial Stipulation dated June 24, 2005, which are incorporated herein.

DATED this 1st day of September, 2005.

Enter: /s/ CS Austin
JUDGE

#34500 – Haskin & Corrigan, LLC
Attorneys for Kimberly Woodson
128 S. County Farm Road
Wheaton, Illinois 60187
(630) 665-0800

EXHIBIT A

CIRCUIT COURT OF THE
18TH JUDICIAL CIRCUIT
DuPage County, Illinois

505 N. County Farm Road
Wheaton, Illinois 60187-3907

C. STANLEY AUSTIN
Associate Judge

[SEAL]

August 23, 2005

Lyle Haskin, Esq.
Barbara Corrigan, Esq.
Haskin & Corrigan, LLC
128 South County Farm Road
Suite A
Wheaton, Illinois 60187

James Hagler, Esq.
Law Offices of Jeffrey [sic] M. Leving, Ltd.
19 South LaSalle Street
Suite 450
Chicago, Illinois 60603

RE: In Re. The Marriage of Christopher M. Gambla and Kimberly Woodson

DuPage County Case No. 03 D 1116

Dear Counsel:

Please consider this correspondence to be my Letter of Opinion with regard to the above-referenced matter. As you know, this matter proceeded to trial over a period of 17 court days this past summer. The primary contested issue was that of custody of the parties' minor daughter, Kira Gambla. The Court heard testimony from the parties, four expert witnesses, namely Dr. Daniel Hynan, Dr. Roger Hatcher, Dr. Anita Thomas, and Dr. Charles Alexander, a treating counselor named Larry Shulman, and occurrence and character witnesses including Arline Gambla, Anthony Morello, and Rajkumar Rambhajan on behalf of the Petitioner, and Linda Dorsey, Donna Stevens, Kate Evans, and Marion Cook on behalf of the Respondent. In arriving at a decision, the Court has considered the testimony of the above-named witnesses, all Exhibits admitted into evidence, and the statutory factors to be considered when determining custody as contained in 750 ILCS 5/602 of the Illinois Marriage and Dissolution Act.

Let me preface this ruling by stating how difficult a decision this has been for the Court. In many respects, this case is a tragic one, not tragic in the sense that Kira is in any sort of physical or emotional danger were her custody to be placed with either parent, but tragic in the classical Greek tragedy sense in that people, in this case, the

Petitioner and Respondent who are in all other respects good, decent and honorable people, suffer from a fatal character flaw which results in misery being brought into their lives. In this case, that fatal flaw is their unwillingness and inability to settle their own differences, adjust their own personal approaches to parenting and interaction with each other, and put the best interest of this child first. As a result, countless hours of time, vast sums of money, and untold emotional heartache have been engendered in this case. This is a case that cries out for joint custody because both parents love their daughter, are willing and able to provide for her care, and are in all respects good parents. Because Kira is a biracial child, her best interests would be best achieved by the parties working cooperatively to promote a sense of pride in her racial diversity and to jointly work to protect her from the sometimes cruel nature of the way society can treat people based on their race. This case could be an example of racial harmony and promotion of pride in ethnic diversity that would benefit Kira. But because of the inability and unwillingness of Mr. Gambla and Ms. Woodson to act cooperatively on her behalf, such will not be the case. The Illinois Marriage and Dissolution of Marriage Act requires the Court to consider an award of joint custody and the Court has done so. The Court has taken into account the fact that neither party has asked for joint custody, and the expert witnesses' testimony that joint custody is not recommended in this case, along with this Court's impression of the testimony elicited from both parties, and based upon all of the foregoing, the Court will not enter an order for joint custody of Kira.

Thus, the Court is left with the very difficult task of assessing the parties' respective claims for sole custody in

light of the statutory factors contained in Section 5/602 of the Marriage and Dissolution of Marriage Act. Each of the listed factors shall be considered in turn.

First, as to the wishes of the child's parent or parents to her custody, as all of the experts testified, and as the Court personally observed, both parties wish to be awarded the sole custody of Kira. The Court finds each party's request to be well founded and well intended.

Second, with regard to the wishes of the child as to her custody, given Kira's young age, she is unable to express her wishes relative to her custody, though the Court notes parenthetically that by all accounts of all of the witnesses both professional and lay, she loves both of her parents and is happy when she spends time with each of them.

Third, as to the interaction and interrelationship of the child with her parents, her siblings and any other persons who may significantly affect her best interests, the Court again finds, based upon the testimony both of the psychologists who evaluated this case and the lay witnesses who testified about Kira's relationship with both of her parents, Kira to have a loving relationship with each of her parents. In addition, the Court finds that she has an appropriate, loving relationship with her stepbrother Che, when she is with the Respondent, and she has a loving appropriate, relationship with her cousins with whom she lives when she spends time with the Petitioner. In addition, there is no indication that she has anything other than a loving relationship with her grand parents, her aunts and uncles and all other family members with whom she comes in contact. In short, she is a loving child who

loves her relatives in addition to her parents and who, by all accounts, is loved by each of them as well.

Fourth, as to Kira's adjustment to her home, school, and community, there is no indication from the evidence that Kira has any difficulty in the home environment when she resides with her Father in her grandparents home nor when she resides with her Mother at her Mother's apartment. If there is any difficulty in the adjustment that she has had, it is in connection with the uncertainty which necessarily has flowed from this custody conflict, and efforts by the Court to minimize conflict while the case is pending.

Fifth, as to the mental and physical health of all individuals involved, there is no indication, professionally or otherwise, that either of the parties suffer from any mental or physical maladies that would preclude them from parenting their daughter. Clearly, the evidence showed that each has an entirely different parenting approach, outlook on life, and feelings about what is best for Kira, but the Court finds that there is no evidence to suggest that those differences are rooted in a mental, physical or psychological issues which pose a risk to Kira. To the extent that either party had any elevations on psychological tests administered to them, the Court finds these elevations insignificant and irrelevant to their ability to parent Kira.

As to the sixth and seventh factors, physical violence or the threat of physical violence, or the occurrence of ongoing abuse, the Court is not convinced that there has been any violence or threat of violence directed by either party against the other. To the extent that there have been incidents of conflict, the Court finds them to have been

verbal or written in nature a vast majority of the time, and the Petitioner's attempt to convince the Court that the Respondent has been physically violent towards him was unpersuasive.

The final statutory factor contained in Section 5/602 of the Marriage and Dissolution of Marriage Act involves the willingness and ability of each party to facilitate and encourage a close and continuing relationship between the other parent and the child. Each party gave significant lip service to their willingness to do so, but there certainly have been problems in doing so during the pendency of this case. The Court finds those difficulties to have arisen out of the on going inability of the parties to be willing to compromise and communicate, not out of any inherent inability of either party to facilitate that relationship. The Court is aware that both Dr. Hynan and Dr. Hatcher have opined that it is in Kira's best interest that her custody be awarded to the Petitioner, primarily, though not exclusively, based upon their opinion that he is the one most able to foster and encourage a close relationship with the other party. The Court has reviewed their written reports and listened closely to their testimony and concludes that the primary basis of that opinion was the pendency at the time they did their evaluation of a Petition then on file by the Respondent to remove Kira from the State of Illinois and relocate her to North Carolina. Each of those experts acknowledged that that factor weighed heavily in their opinion, and each acknowledged that the fact that the Petition has been withdrawn by the Respondent would affect the weight to be given to that factor in the basis of their opinions. As can been [sic] seen by a review of the above, this case is exceedingly close on the issue of custody. The only good news is that no matter which way the

Court comes down on the award of custody, the child will be in good hands and will be properly cared for. The efforts by both parties to somehow portray the other as an unfit or uncaring parent or a bad person has [sic] failed, in this Court's opinion. We are left with two loving, caring and able parents who can't agree on what to do with their daughter.

The Statute also requires the Court to consider all relevant factors in addition to those specifically enunciated in the Statute. The Respondent has asked the Court to consider the issue of race in making its award of custody. Her experts, Dr. Thomas and Dr. Alexander, though not making a formal recommendation as to custody, seemed to be testifying for the proposition that solely because the Respondent is African American and because Kira is a biracial child, her custody should be awarded to the Respondent. In this case, the Court finds no compelling reason to accept that broad stroke approach. However, it is true that the Respondent will be able, if awarded custody, to provide Kira with a breadth of cultural knowledge and experience that the Petitioner will not be able to do. Kira will have to learn to exist as a biracial individual in a community and society that is sometimes hostile to such an individual. The Court believes that both parties are well intentioned when they say that they will attempt to expose Kira to all aspects of her ethnic heritage but there are some obvious limitations imposed upon both.

Having considered all of the foregoing and recognizing the closeness of this question, and given the fact the parties are unable to work together in a joint custodial arrangement, the Court awards sole custody of the minor child, Kira, to the Respondent, Kimberly Woodson. The Court finds each of the parties to be fit and proper persons

to be awarded her custody and to exercise full visitation and parenting rights but awards custody to the Respondent based on her slightly better ability to provide for the emotional needs of the child which may be occasioned by her special circumstances as discussed above. The Petitioner is awarded extensive visitation rights with Kira but given the inability of the parties to communicate well about such matters, the Court will delineate a specific schedule as follows:

Until such time as Kira is enrolled in school, the parties will continue to share time with Kira on an alternating week basis as they are doing under the Temporary Order entered herein. Once Kira is enrolled and attending school, during the school year, the Petitioner will have alternating weekends with Kira from after school on Friday until Sunday at 6:30 p.m., and will have two periods of dinner visitation with Kira from after school until 6:30 p.m. each week on Tuesdays and Thursdays. The parties will alternate legal holidays and will alternate spring vacation (break) on an annual basis and will split Christmas Vacation equally on an annual basis. During the summer, however, each party will have two non-consecutive one-week periods of uninterrupted vacation time with Kira and the balance of the summer will be split equally with Kira to be with each parent for one week periods subject to the other parent having Tuesday and Thursday dinner periods with Kira. In the event of any conflict of schedules, vacation time supercedes holiday time and both supercede regular visitation time.

As to the financial arrangements relative to Kira, the terms of the Trial Stipulation, paragraphs 3, 4, 5, 6 and 7 are adopted by the Court as Orders as part of the Judgment to be entered herein. As to the issue of child support,

Mr. Gambla will pay as and for child support the sum of $1,500.00 per month to be paid by way of an Order of Support and Withholding Order. The Court finds this amount to be 20% of his net income. Post emancipation support shall be paid pursuant to Section 5/513 of the Illinois Marriage and Dissolution of Marriage Act.

With respect to the financial matters involving the parties, the Court finds each of the parties to be capable of providing for their own support, and that fact in addition to the very short duration of this marriage leads the Court to bar each of the parties from the receipt of maintenance one from the other.

As to the property allocation and other financial matters, the Court adopts paragraphs 2 (a-h), 8 and 9 of the Trial Stipulation as the resolution of all other financial matters involving the parties with the exception of attorneys' fees. As to the request by the Respondent for contribution to her fees, the Court has considered the original Petition for Attorneys' Fees, the first and second amendments to that Petition and the Petitioner's Response and Motions to Strike relative to those Petitions. In addition, the Court has considered the financial positions of the parties and the statutory factors contained in Section 508(a) and 503(j) of the Illinois Marriage and Dissolution of Marriage Act. The Court has also considered the income and assets that the parties have and will have based on the Judgment to be entered herein, and based upon all the foregoing, the Court orders that the Petitioner will contribute to the Respondent's attorneys fees the sum or $25,000.00.

Finally, the Court finds as to the issue of grounds that irreconcilable differences have arisen between the parties

which have caused the irretrievable breakdown of the marriage, that past attempts at reconciliation have failed, and future attempts will be impracticable and not in the best interest of the parties. The Court further finds the parties have resided separate and apart for a continuous period in excess of six months and by written stipulation have agreed to waive the statutory two-year waiting period for those grounds. Counsel for the Respondent is directed to prepare a Judgment and appropriate accompanying Orders incorporating the terms of this Letter of Opinion, submit it to counsel for the Petitioner for his review and approval, and present it to the Court on September 1, 2005 at 9:25 a.m. This matter has been placed on the Court's calendar for that purpose. The Court also wishes to thank all counsel for their efforts in presenting their client's positions to the Court in a clear and concise manner which was of great assistance to the Court as it made this very difficult decision.

Very truly yours,

/s/ CS Austin
C. Stanley Austin
Presiding Judge
Domestic Relations Division

CSA:cds
Gamblaopinion

EXHIBIT B

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT DU PAGE COUNTY, WHEATON, ILLINOIS

IN RE: THE MARRIAGE OF CHRISTOPHER M. GAMBLA,	)	Case No. 03 D 1116
	)	cons. w/03 D 1123
Petitioner, Counter-Respondent	)	
and	)	
KIMBERLY K. WOODSON.	)	
Respondent/Counter-Petitioner.	)	

TRIAL STIPULATION

NOW COMES the Petitioner/Counter-Respondent, **CHRISTOPHER M. GAMBLA, (hereinafter "Christopher")** by and through his attorneys, **THE LAW OFFICES OF JEFFERY M. LEVING, LTD.**, and the Respondent/Counter-Petitioner, **KIMBERLY WOODSON, (hereinafter "Kimberly")**, by and through her attorneys, **HASKIN & CORRIGAN, L.L.C.**, and presents to this Honorable Court their joint stipulation as and for certain financial matters before the Court, and further requests this Court to incorporate the stipulation of the parties into the final Judgment for Dissolution of Marriage as follows:

1. That the parties herein have conducted extensive discovery and disclosed their marital assets and liabilities to each other.

2. That the parties agree that as a resolution and full satisfaction of all claims pertaining to marital property herein, excluding attorneys fees and costs and child

support, the following stipulation shall be incorporated into Judgment for Dissolution of Marriage:

(A) Christopher Gambla shall pay to Kimberly Woodson the sum of twenty-five thousand ($25,000) dollars within 60 days of entry of Judgment herein, as a property offset for Kimberly's claims and any interests regarding marital property herein, including, but not limited, the marital portions of the pension, 401(K) plan, any income refunds through 2004, and employees stock option plan acquired by Christopher during the marriage; further, the payment by Christopher to Kimberly is a property offset of property acquired during the marriage, and therefore the payment shall be a non-taxable event.

(B) That Christopher shall be awarded his pension, 401(k) plan, and employees stock option plan in their entirety, free and clear from any and all claims by Kimberly, subject to the completion of the $25,000 payment to Kimberly.

(C) That both parties stipulate that they have sufficient income and assets to provide for their own reasonable and necessary living expenses, and therefore both Christopher and Kimberly waive any and all claims to maintenance/spousal support from the other, and each shall be permanently and forever barred from seeking maintenance from the other, upon entry of Judgment herein.

(D) That Christopher shall contribute the sum of $2,532.36 to the outstanding balance of $8,555.92 on Kimberly's Citibank card directly to Citibank and furnish Kimberly a copy of the check thereof, within 60 days of entry of Judgment. Said payment shall release Christopher from any and all claims by Kimberly for contribution

by Christopher regarding said payment. Effective instanter, Kimberly shall be solely liable for the balance of the Citibank Card and the monthly payments, and indemnify and hold Christopher harmless thereafter; however, this payment shall not debar Kimberly from seeking contribution from Christopher for attorneys fees and costs.

(E) That the parties stipulate and agree that each party is awarded, and each party shall retain, the personal marital property in their possession free and clear from any claim by the other, and each party shall retain as their sole and separate party any savings accounts, checking accounts, credit union accounts, or any other money market, or savings held solely in their own name free and clear from any claim by the other.

(F) That with the exception of paragraph 2, subparagraph (D) hereinabove, each party shall be solely responsible and hold the other harmless for any other consumer credit card debt/account maintained in their own name.

(G) That Christopher shall be awarded his vehicle, a 2002 Honda Civic, free and clear from any and all claims by Kimberly and Christopher indemnifies and holds Kimberly harmless from all past, present, and future financial liabilities concerning said automobile.

(H) That Kimberly shall be awarded her vehicle, a 2003 Honda CRV, free and clear from any and all claims by Christopher and Kimberly indemnifies and holds Christopher harmless from all past, present, and future liabilities concerning said automobile.

3. That both parties shall maintain medical insurance for minor child Kira Gambla available through their employers.

4. That the parties respective obligations to contribute to the uninsured medical costs incurred by the minor child after Judgment is [sic] reserved for further determination by the Court, however, Christopher and Kimberly agree that if either party fails to utilize the medical providers as set forth in their respective health care plans and incurs an uninsured expense for their failure to stay within the plan, that party shall be solely liable for the uninsured expense. This provision shall not apply to necessary emergency care for the minor child.

5. That each party shall be solely responsible for any nominal office or prescription co-pay incurred for the minor child when the minor child is in their possession and taken to the physician.

6. That Christopher shall maintain a $250,000 life insurance policy so long as he is obligated to support/educate Kira, naming Kira as irrevocable beneficiary for said amount thereof, but in no event shall Christopher be obligated to maintain said policy beyond Kira obtaining the age of 23. Christopher shall have the right to designate the trustee on behalf of Kira regarding said insurance.

7. That Kimberly shall maintain a $100,000 life insurance policy so long as she is obligated to support/educate Kira, naming Kira as irrevocable beneficiary for said amount thereof, but in no event shall Kimberly be obligated to maintain said policy beyond Kira obtaining the age of 23. Kimberly shall [have] the right to designate the trustee on behalf of Kira regarding said insurance.

8. That Christopher is awarded free and clear from any claim by Kimberly his interest in his pre-marital residence commonly known as 1325 Nagel Court, West Chicago, Illinois, and Kimberly waives any claim for reimbursement from Christopher to Kimberly or the marital estate for any financial contributions Christopher made regarding said property and residence during the marriage.

9. That Kimberly is awarded free and clear from any claim by Christopher her interest in her pre-marital residence commonly known as 3070 Larose, East Point, Georgia, and Christopher waives any claim for reimbursement from Kimberly or the marital estate for any financial contributions Kimberly made regarding said property and residence during the marriage.

10. That the temporary Orders requiring the Petitioner to pay temporary support, allowances, and maintenance shall be dissolved and terminated by operation of law upon entry of Judgment for Dissolution of Marriage herein.

So Stipulated this 24th day of June, 2005:

/s/ Christopher M Gambla
Christopher Gambla, Petitioner

/s/ KK Woodson
Kimberly Woodson, Respondent

Approved:

/s/ James M. Hagler
Attorney for Petitioner

/s/ Barbara A[illegible]n Corrigan
Attorney for Respondent

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EXHIBIT C

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

IN RE THE MARRIAGE OF	)	
CHRISTOPHER M. GAMBLA,	)	
Plaintiff,	)	
and	)	NO. 03 D 1116
KIMBERLY WOODSON,	)	
Defendant.	)	

AGREED ORDER

(Filed Oct. 4, 2004)

This cause coming on to be heard by agreement of the parties, both of whom waive Notice for the presentation and entry of this Order, the court finds as follows:

1. That it has jurisdiction of the subject matter and of the parties.

2. That the parties have reached an agreement, as stated herein.

3. That the parties' agreement is in the interests of their minor child, Kira.

And now being fully advised in the premises:

IT IS ORDERED as follows:

A. ~~Immediately upon entry of this Order,~~ [/s/ CSA] the parties ~~will~~ [have /s/ CSA] separate[d /s/ CSA] and reside in their separate residences. The parties shall advise each other of their addresses and telephone numbers when, as, and if such information changes.

B. Between the date of the entry of this Order and the entry of any subsequent court order, the parties shall have parenting time with their daughter, Kira, as follows:

1. KIMBERLY shall have parenting time and responsibility for Kira on alternate weekends, commencing at ~~9:00 a.m.~~ [5:30 p.m. /s/ CSA] on Friday until ~~9:00 a.m.~~ [5:30 p.m. /s/ CSA] on Monday. On the opposite weekends, CHRISTOPHER shall have parenting responsibilities for Kira during the aforesaid hours.

2. On the Monday and Tuesday following a parent's alternate weekend parenting time, the other parent shall have responsibilities for Kira from Monday at ~~9:00 a.m.~~ [5:30 p.m. /s/ CSA] until Wednesday at ~~9:00 a.m.~~ [5:30 p.m. /s/ CSA]. Beginning on Wednesday at ~~9:00 a.m.~~ [5:30 p.m. /s/ CSA], the first parent shall have parenting responsibilities for Kira until ~~5:00~~ [5:30 /s/ CSA] p.m. on Friday.

3. This rotation shall continue so that each party has parenting responsibilities for Kira fifty percent (50%) of the time.

C. The court makes no determination of temporary custody. Consequently, the parties shall continue to make joint decisions regarding Kira's best interests.

D. ~~In the event a party is not available for his or her parenting time, the opposite party shall be given at least twenty-four (24) hours advance notice and shall be given the opportunity to provide parenting time and responsibilities for Kira during the time that the first parent is not available.~~ [Transportation will be provided by the parent picking up the child from the party in possession. /s/ CSA]

Dated this 4 day of ~~September~~ [October /s/ CSA], 2004.

AGREED: ENTER:

/s/ CS Austin

Attorney for Judge
Christopher M. Gambla

Attorney for
Kimberly Woodson

#34500 – Haskin & Corrigan, LLC
Attorneys for KIMBERLY WOODSON
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Wheaton, IL 60189-0031
630-665-0800

APPENDIX E

#48717

IN THE CIRCUIT COURT
FOR THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, WHEATON, ILLINOIS

IN RE: THE MARRIAGE OF	)
CHRISTOPHER M. GAMBLA,	)
Petitioner, Counter-Respondent	) Case No. 03 D 1116
and	) cons. w/03 D 1123
KIMBERLY K. WOODSON.	)
Respondent/Counter-Petitioner.	)

MOTION TO BAR THE REPORT AND TESTIMONY OF CONTROLLED EXPERT WITNESS ANITA THOMAS, PH.D

(Filed Oct. 29, 2004)

NOW COMES the Petitioner/Counter-Respondent, **CHRISTOPHER M. GAMBLA,** by and through his attorneys, **THE LAW OFFICES OF JEFFERY M. LEVING, LTD.,** and in moves this Court to bar the testimony and report of Anita Thomas, Ph.D., and in support thereof, respectfully states to the Court as follows:

1. That the Respondent/Counter-Petitioner has retained Anita Thomas, Ph.D., as a controlled expert witness.

2. That on October 15, 2004, the Respondent/Counter-Petitioner disclosed the report of Dr. Thomas, who, according to her curriculum vitae, holds a Doctor of Philosophy in Counseling Psychology, awarded from Loyola University in 1995.

3. That Dr. Thomas, according to her curriculum vitae, wrote her doctoral dissertation on "Racial Identity and Racial Socialization Attitudes of African-American Parents".

4. That there is no indication that Dr. Thomas has performed custody evaluations, or performed psychological testing of parents pertaining to custody issues.

5. That Dr. Thomas [sic] report interjects racial, gender/sexism, and social class issues relating to African/American women to support her conclusions.

6. That the issues of racial differences, racial identities, sexism, cultural differences purportedly encountered by African American women are not appropriate factors for the Court to consider in awarding custody as set forth by 750 ILCS 5/2-602.

7. That the report of Dr. Thomas appears to inject the issues of personal and societal bias pertaining to race, gender, culture, socioeconomic status, which interfere with the objectivity of the evaluation and its subsequent recommendations.

8. That the report of Dr. Thomas makes multiple assertions and assessments which appear to be unsupported by professional documentation and authority to adequately support her findings or conclusions, and Dr. Thomas only spent minimal time interviewing the Respondent/Counter-Petitioner and did not interview the Petitioner/Counter-Respondent at all.

9. That the U.S. Supreme Court has held that the goal of granting custody based on the best interests of a child is indisputably a substantial governmental interest

which invokes the Equal Protection Clause. ***Palmore v. Sidoti***, 466 U.S. 429, 104 S.Ct. 1879 (1984).

10. That the U.S. Supreme Court has specifically rejected the consideration of racial biases, or the effects of racial prejudices and classifications, in considerations of child custody matters as a violation of the Equal Protection Clause of the Constitution. ***Palmore v. Sidoti***, 104 S.Ct. at 1879.

11. That were the Court to consider the report of Dr. Thomas or hear her testimony on issues which pertain to classifications of race, gender, culture, and socioeconomic issues as set forth in her report, the Court would consider possible private biases wholly outside the mandated statutory factors, which are outside of the Court's subject matter jurisdiction and would violate the Petitioner/Counter-Respondent's rights to equal protection under the law.

12. That as the report of Dr. Thomas greatly rests on impermissible classifications and theories and impressions outside the scope of 750 ILCS 5/602, and interjects issues of racial biases which ought to have been excluded by the evaluator ab initio to preserve the objectivity of the report, the report of Dr. Thomas and her testimony ought to be barred, with prejudice.

13. That the opinion, testimony, and report of Dr. Thomas ought to be excluded as it is not based on adequate foundation, nor is there any indication that said opinion is based on theory that is generally accepted in the field of forensic custody evaluations. ***In re the Marriage of Jawad and Whalen***, 736 Ill.App.3d 141, 759 N.E.2nd 1002, (2nd Dist. 2001), Illinois follows the test set forth in ***Frye v. United States***, 293F. 1013 (D.C.Cir. 1923).

WHEREFORE, the Petitioner/Counter-Respondent, **CHRISTOPHER GAMBLA**, respectfully prays for the following relief:

A. That the testimony of Dr. Anita Thomas be barred and her report excluded from evidence, both with prejudice;

B. That the Petitioner/Counter-Respondent be awarded attorneys fees and costs incurred in the preparation and presentation of this Motion;

C. For such other and further relief as this Honorable Court deems just and equitable.

Respectfully submitted,
Christopher Gambla, by his attorneys,

/s/ James M. Hagler
The Law Offices of
Jeffery M. Leving, Ltd.

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APPENDIX F

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT
OF DU PAGE COUNTY
FOR THE EIGHTEENTH
JUDICIAL CIRCUIT OF ILLINOIS

IN RE THE MARRIAGE OF: CHRISTOPHER M. GAMBLA, Petitioner,	)	No. 03D1116
vs.	)	**ORIGINAL**
KIMBERLY K. WOODSON, Respondent.	)	

REPORT OF PROCEEDINGS had and testimony taken at the hearing of the above-entitled cause, before the Honorable STANLEY C. AUSTIN, judge of said Court, recorded on the DuPage County computer based digital recording system, DuPage County, Illinois, and transcribed by Trina M. Spizzirri, commencing on the 27th day of December, A.D., 2004, P.M. session.

* * *

[3] THE COURT: Gambla and Woodson.

MR. HAGLER: Good afternoon, your Honor.

James Hagler for the petitioner, Christopher Gambla.

MR. HASKIN: Good afternoon, your Honor.

Lyle Haskin on behalf of Kimberly Woodson who is present in court.

THE COURT: All right.

We have a number of matters on the call this afternoon most of which I believe are legal argument as opposed to evidentiary in nature, correct?

MR. HASKIN: Yes, judge.

We did – before we get to the things we all know about, we did notice a motion in limine for today. It was inadvertently noticed for hearing instanter and it should have been obviously noticed for setting because certainly Mr. Hagler needs to respond to it.

THE COURT: Well, that's – and I saw that and I think if I read it correctly has to do more with the trial itself as opposed to any of the hearings that were scheduled this afternoon, correct?

MR. HASKIN: Yes.

[4] That's correct, your Honor.

THE COURT: Okay. That's fine.

MR. HASKIN: So, judge, I think – I don't know in which the order in which the Court wishes to take these motions. I think the first file was a motion to bar the reported testimony of Anita Thomas.

THE COURT: Right.

I, of course, have not seen that report. So to the extent that there is – there are references in the report, you know –

MR. HASKIN: Judge, you specifically indicated that you wanted a copy of, provided to you and Mr. Hagler, I think since it was his motion, says he would do that. But I know what his schedule has been like so I made courtesy copies for you just in case.

THE COURT: Okay.

MR. HASKIN: What I have handed the Court is a copy of Dr. Thomas's curriculum vitae and a copy of her written report. If this Court wants to take a few minutes to read through her report or –

THE COURT: Well, let me ask you this. It appears from the motion and the response to the [5] motion that there isn't a great deal of disagreement about what's contained in the report. The question is whether or not that which is contained as referenced is something that ought to be considered when doing a custody determination. I mean, it appears that the topic area at least that is the subject of her reporting even though I haven't seen it, is one that Mr. Hagler is saying is not an appropriate area of inquiry, area of consideration by the Court in making a custody determination and you're going to, Mr. Haskin, you are going under I guess a more general approach when dealing with best interests of the children. I shouldn't be looking at anything that might have relevance to that general area.

MR. HASKIN: Judge, I think that's a fair statement. However, there is another portion of our argument which of course in the format of pleadings doesn't necessarily disclose itself because of admissions and denials.

The other part of our argument is that we do not believe that Mr. Hagler's allegations in his motion relative to what Dr. Thomas says or her reasons for her conclusions are in fact contained in [6] the report but that's something that we can argue. However, I think from that perspective, I think the Court may need to take a few minutes to look at the report or we can point out different things to you.

THE COURT: Let me back it up one step further.

I think we had determined at a prior conference that Dr. Thomas is not rendering an opinion relative to custody, what's in the best interests of the child, but rather, if I'm not mistaken, is in some way attacking is probably too –

MR. HAGLER: Rebuttal.

THE COURT: Rebuttal or impeaching Dr. Shapiro or any of the other –

MR. HASKIN: Yes.

Dr. Hynan and Dr. Hatcher.

THE COURT: Dr. Hynan and Dr. Hatcher's custody evaluations I gather based on their alleged failure to consider certain factors which she believes deems to be important in custody evaluations. But it's not – I don't have dueling custody evaluations between Dr. Thomas and any of the other doctors, correct?

[7] MR. HAGLER: No.

You do not have dueling custody evaluations but you do have now there has been rebuttals issued by Dr. Hynan and Dr. Hatcher and I'm beginning to wonder what we are

going to do with relevance. Does the Court want to hear those? I'm beginning to wonder if we need to have a Frye hearing in full prior to the commencement of this trial or when Dr. Hynan, Dr. Hatcher, appear because they have opinions and the whole idea is this, number one, is this scientific evidence that should be considered? Is it a generally accepted theory? Number two, is it appropriate? Are these theories appropriate under 602? And I have some serious concerns that they are not.

But we have Dr. Hynan who is the Court's witness has already issued a rebuttal regarding that. I think it's very very elucidating to the Court and perhaps the Court should consider that, too.

MR. HASKIN: Judge, I'm not really sure how one could consider Dr. Hynan's rebuttal. I mean, it's Mr. Hagler's motion, Mr. Gambla's motion, is not a motion for a Frye hearing. It is a motion to [8] debar the report and testimony of Dr. Thomas. If Mr. Gambla now seeks a Frye hearing, I think that is a whole different construct in terms of what we do.

The Court began today by saying that this is mostly legal argument and I agree. However, if we are going to look at Frye and the Illinois progeny of Frye, then I think it becomes a factual question, not a legal question. I mean, to the extent that Mr. Gambla makes allegations in his motion regarding what Dr. Thomas says and how her statements allegedly do not comport with the requirements of the law and he cites two cases, Jawad, J-a-w-a-d, versus Welan (phonetic) and Palmorie (phonetic) versus Sadoty (phonetic), which is a U.S. Supreme Court case.

You know, our position is that Dr. Thomas's report does not step outside of either of those two cases. To that extent, I think this is a factual hearing.

THE COURT: Isn't there a difference, Mr. Hagler, between impeachment which is, for lack of a better term, that's the term – I know that has a legal consequence – ?

MR. HAGLER: I understand.

[9] THE COURT: – but an attack or a reason that I should not believe Dr. Hynan's opinion? Isn't there a difference between that and a contrary expert opinion on custody based on the factors that Dr. Thomas apparently thinks that Dr. Hynan does not take into consideration sufficiently such that we are – the basis for Dr. Thomas's opinions would make her opinion subject to Frye or subject to some sort of reliability standards as opposed to, judge, here is a reason why you shouldn't believe Dr. Hynan because he doesn't take into consideration X, Y, and Z, which could be based on scientific principle? It could be based on testimony, you know, testimony by the grandma. It could be based on, you know, alleged, you know, prejudice against an individual. Isn't there a difference between the standard that I ought to apply to that when it's basically impeachment? I remember a law school professor that said you can impeach with a ham sandwich if there is something impeaching about the ham sandwich, whether or not the ham sandwich would be able to be rendered as an opinion in and off [sic] itself based on scientific certainty and so forth. Isn't there a distinction between what we are doing here? We don't have an [10] opinion by Dr. Thomas that says custody should be this way because of factors X, Y, and Z. Instead, we have apparently someone

who is going to challenge the opinion of Dr. Hynan because allegedly Dr. Hynan did not take into consideration X, Y, and Z. And isn't that a different scenario?

MR. HAGLER: It is, and I regret the Court hasn't had the opportunity to read the report. It's hard for you to understand what – we are arguing a vacuum here. But the report offers theories that were not considered by the custody evaluators or if they were, they were discounted because –

THE COURT: Okay.

So what's wrong with that? Why can't the witness, you know, Dr. Hynan say or whoever, you know, either I did consider it or I didn't think it was worthy of consideration or I considered it and rejected it and, therefore, judge you should still believe my opinion? And you argue, yes, judge, you should believe Dr. Hynan's opinion and Mr. Haskin argues, judge, you should not believe Dr. Hynan's opinion because of all of this. It strikes me, I guess, to, you know, maybe put it all in a nutshell. It strikes me as the concern here is more [11] in the nature of what if any weight I should give to Dr. Thomas's alleged opinions relative to what Dr. Hynan and anyone else might have done as opposed to, judge, believe Dr. Thomas's opinion on custody over one of these other opinions. I think there is a distinction.

MR. HAGLER: And I agree with you, judge. But some of the theories that are argued in this the Court should not consider. They are impermissible under the constitution. They are not scientifically accepted. They are outside the scope of 602.

So when you hear these wild theories –

THE COURT: Well, I think I'm capable of ascertaining wild theory versus something else when, you know, when, you know, and I don't want to minimize it, but if I have Uncle Charley that comes in and says custody shouldn't go to mom because on Thursday night mom plays, you know, bingo and spends a bunch of money and leaves the child someplace, that doesn't really affect best interests of the child per se. It's kind of a crazy theory out there, a crazy allegation out there, alleged crazy allegation out there. How is this any different [12] than that I guess in the grand scheme of things?

MR. HAGLER: Well, essentially if you are going to consider, no matter what weight you give, you are going to consider racial factors in custody evaluations or attack them because of theories supporting racial factors. I think it's unconstitutional and I think you are violating the equal protection clause.

I would suggest the Court read this report, if you have the opportunity and consider – if you want to hear some argument, I would be happy to proceed. But I think you should read the report, your Honor. Then I think you'd understand where I'm going with it.

THE COURT: Well –

MR. HAGLER: Because we are going to have a lot of – maybe we are going to end up, if she does testify, we are going to have multiple objections to each question.

THE COURT: And you might be fine on those and that might all go to that. But that doesn't mean, I don't think especially since it's not an opinion based on these alleged – because the cases you cite to me say you cannot consider [13] racial-related issues when you

determine custody. Okay. And that's fine. But that doesn't necessarily mean since she isn't rendering an opinion on custody, she is apparently rendering an opinion on whether certain factors as it relates to best interests of the children were taken into account in the recommendation made by the doctor.

MR. HAGLER: Well, she far exceeds that. She goes outside of Wilson v. Clark. She goes outside of what's in these reports and she has her own theories, incorporates her own theories, which weren't addressed by the doctors.

THE COURT: But it goes to the issue of whether Dr. Hynan and any of the others appropriately considered other factors. Yes? She isn't rendering an opinion that says custody should be with mom? She is saying you shouldn't believe Dr. Hynan's opinion that custody should be with dad assuming that's what the doctor – I want to make sure –

MR. HAGLER: Well, she does make an opinion about custody.

THE COURT: Well, I was told that it was not a custody evaluation and it isn't a custody [14] evaluation.

MR. HAGLER: She did make an opinion at the conclusion.

Would you concur?

MR. HASKIN: No, I do not concur. Her opinion – her opinion does not say it is in the best interests of Kira to be – that her custody be awarded to Ms. Woodson or to Mr. Gambla or to anyone else. And I respectfully disagree that any of her opinions are based upon racial considerations that are addressed in any of the cases that counsel

has cited, Palmorie [sic] and Sadoty [sic], for example, or Jawad and Welan [sic], or even a more recent case than that in Illinois, Russell versus Russell.

THE COURT: All right.

I'm going to deny the motion to bar. It may be subject to an appropriate motion in limine relevant to certain opinions that she may attempt to render.

But as I read, I just took a quick glance at the conclusion paragraph, that being the opinion, at least the only thing that starts out being the opinion, it's my opinion that, there doesn't appear to be anything there relative to what's in anyone's [15] best interests but rather that the custody evaluations done by Dr. Hynan and Hatcher provide no concrete evidence to question Ms. Woodson's parenting skills or ability.

MR. HAGLER: If it reads on, it says –

THE COURT: And recommends mediation. Okay. Well, that's –

MR. HAGLER: To lead to shared or joint custody.

THE COURT: Well, I think everybody has that. I have that goal. That parties would attempt to mediate their disputes in such a way that they would come to an agreement with regard to custody. So I don't view that as a significant problem.

So I'm going to deny the motion to bar the report and testimony. You may have to deal with some more specific issues, you know, during either the examination or by way

– I know she has been deposed but by way of motions in limine.

* * *

APPENDIX G

UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

STATE OF ILLINOIS **COUNTY OF DUPAGE**

In re the Marriage of Christopher M. Gambla -vs- Kimberly K. Woodson	Case Number 03 D 1116

ORDER

(Filed Dec. 27, 2004)

This matter coming on to be heard, the Court being fully advised in the premises and having jurisdiction of the subject matter, IT IS ORDERED HEREBY:

A. Plaintiff's Motion to Bar the Report and Testimony of Controlled Expert Witness Anita Thomas, Ph.D. is denied.

B. Defendant's Motion in Limine filed December 17, 2004 is continued to the trial date and Defendant is granted leave to answer plaintiff's Motion to Strike and Dismiss Motion in Limine within 14 days. The Motion to Strike will be heard on the date of trial unless decided earlier.

C. Leave is granted to Plaintiff to amend his SCR 216 Request to Admit to the extent of the paragraphs to which Defendant objected. All paragraphs not previously denied or not previously responded to are deemed admitted.

D. Plaintiff's objection to paragraph 4 of Defendant's 216 Request is overruled and Plaintiff's answer to paragraph 31 is stricken. Plaintiff shall answer paragraph 31 within 14 days. Plaintiff's objections to paragraphs 5, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 are sustained. Plaintiff's answer to paragraph 30 stands.

E. Plaintiff has tendered his check today for $443 payable to Defendant for January 2005 living expenses, pursuant to the Order entered August 11, 2003.

F. This cause is set for January 6, 2005 at 9:25 in 3003 for status and January 10, 2005 at 9:30 in #3003 for hearing on temporary maintenance and child support.

G. Depositions shall be completed by February 15, 2005.

Name: Hashin & Corrigan LLC

DuPage Attorney No.: 34500

Attorney for: Respondent

Address: 128 S. County Farm

City/State/Zip: Wheaton 60189-0031

Telephone: 630-665-0800

Enter: /s/ CS Austin
JUDGE

DATE: Dec. 27, 2004

APPENDIX H

STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF DU PAGE COUNTY
FOR THE EIGHTEENTH
JUDICIAL CIRCUIT OF ILLINOIS

IN RE THE MARRIAGE OF:	)	
CHRISTOPHER M. GAMBLA,	)	
Plaintiff/Counter-Defendant,	)	
-vs-	)	No. 03 D 1116
KIMBERLY WOODSON,	)	
Defendant/Counter-Plaintiff.	)	

REPORT OF PROCEEDINGS had and the testimony taken at the hearing of the above-entitled cause, before the Honorable STANLEY AUSTIN, recorded on the DuPage County Computer Based Digital Recording System, DuPage County, Illinois, transcribed by Stacy Jozwiak, Certified Shorthand Reporter, commencing on Tuesday, the 21st day of June, A.D. 2005.

* * *

[54] THE COURT: All right. Mr. Haskin.

MR. HASKIN: Thank you, your Honor. At this time I move that Dr. Thomas be found to be an expert within the scope of this case, thank you.

THE COURT: And the scope of this case, just so I'm clear, is whether she's qualified to render an opinion

about the process that Doctors Hynan and Hatcher undertook in rendering their opinions and the factors that they should or should not have taken into account in rendering their custody evaluations; correct?

[55] MR. HASKIN: Yes, sir.

THE COURT: I mean, we're limited to that. We're not – we're not dealing with the issue of whether or not she's qualified to render a custody evaluation opinion, for example.

MR. HASKIN: Yes, Your Honor. I might say it a little bit differently, but the bottom line is, she is not going to be asked for an opinion regarding Kira's best interest, nor an opinion about whether Ms. Woodson should have custody or Mr. Gambla should have custody by award of this Court. She's going to be asked her opinions about the methodology used by Dr. Hynan and Dr. Hatcher, and the – any – any opinion she has regarding what we might loosely call flaws in their interpretation and their – and how those flaws and methodology and interpretation might then, in her opinion, impact the ultimate opinions given by Dr. Hynan and Dr. Hatcher.

THE COURT: Mr. Hagler?

MR. HAGLER: Thank you. Respectfully, Judge, Dr. Thomas appears to be a wonderful person who's studied hard and published quite a bit and lives in the world of academia, and she has a lot of theories, I'm sure, that have welcome ears and may be on the cutting [56] edge. But let's talk about what we're really here for, and we're here for the custody and determination of the minor child, and Dr. Thomas has such a fragmentary picture of what occurred in these two custody evaluations.

She has the two reports, and hour and a half discussion with Kimberly Woodson, some notes from Kimberly Woodson's therapist, and that's it, and the test data. She does not – she has no perspective on the whole balance of what these two doctors considered. And for her to open up – if we're going to open up this custody evaluations [sic] for criticism, by her criteria, and this is what really troubles me, which are personal and societal biases based on race and gender, we are now getting into the area where, I believe, respectfully, and I cited this in my motion, that the Court ought not to consider these areas, because it's a violation of the equal protection clause.

When we start considering racial and gender biases, in custody evaluations, and you heard her say that she believes that, you know, the black parent would be better for a child of a biracial group, because a black parent can basically assimilate that [57] child as that child grows and develops, because she – the child also has minority perspective. We are now considering racial criteria, and we cannot do that in – and I cited this case, Paomore [sic] v. Sidoti, P-a-o-m-o-r-e [sic], v, S-i-d-o-t-i, 466 U.S. 429, 104 Supreme Court 1879, it's a 1984 court case, and the Supreme Court specifically rejected the consideration of racial biases or the effect of racial prejudices and classifications in consideration of child custody matters in violation of the equal protection clause of the constitution.

And if we're going to go further with this report, that's exactly what this Court's going to be asked to consider. And the Court – I know the Court scanned this report, but here we have someone who's opining on the process of the evaluations from a very piecemeal amount of information, who didn't understand the custody factors under 602, who wasn't aware of the APA guidelines, and by doing this, is

not going to open this Court – is going to open up this whole evaluation process into – into other – and this is a floodgate issue, because we're going to have Oriental people coming in here and saying, these doctors don't consider Orientals. And then we're going to have Indian people [58] coming in, well, this does not consider the Hindu culture or Hispanic culture.

And I think the Court has to take notice that, and I – Mr. Haskin did bring the American – the guidelines from the APA in, and I think both doctors were questioned about their use of the guidelines, and there isn't – the guidelines do require that professionals consider such issues in their reports. I can bring these doctors in to rebut this and make this trial longer, which is – which is what I'm prepared to do, but I'm just stating to this Court that here is an academian whose practice in psychological counselling [sic] and who really doesn't have the expertise to evaluate a custody evaluator, and that's exactly what she's trying to do, evaluate the evaluator.

And I think because of the basis of her knowledge is so – so limited, and she's taking such leaps about cultural factors, such as gender and race, that it's impermissible and it should not be – she should not be permitted to further testify. I have a lot of respect for her qualifications, I have a lot of respect for what she's doing and that it's cutting edge, but I don't think that it's accepted at this point, and she – and it should not be heard by this [59] Court. Thank you.

THE COURT: Well, I'm not afraid of the floodgates here, because I think the – the scope of the opinions that she has rendered in this case are limited. And respectfully I think her opinions are not an evaluation of the

evaluator, but an evaluation of the evaluation process. And the question for me is, in light of her training experience and education, is she qualified to comment upon the process by which Doctors Hynan and Hatcher rendered their opinions. And I don't think there's any question that, based on the testimony that I've heard, she is qualified to do that, by her educational background, by the nature of her teaching, by the nature of her clinical practice.

I will not allow, because Nc. 1, it has been disclosed and – not been disclosed, and No. 2, it's an entirely different issue because I will not let her render an opinion relative to what is in Kira's best interest in terms of whom she should be placed with in this custodial decision, because there are concerns there that she has not done custody evaluations, she is not familiar with the guidelines for those custody evaluations and so forth.

But as I read her report, and as – has been [60] represented to me, her opinion is not going to be that mother or father should have custody in this case because it's in Kira's best interest that they be awarded that she – that her custody be awarded to either mother or father, but rather she is going to render some opinions on the process by which Doctors Hynan and Hatcher rendered their opinion.

We have their opinions in evidence, we have their reports in evidence, we also, I think, have their rebuttal opinions in evidence. So that will all be in the nature of the issues that are presented to me, in any event. So because I'm going to limit the scope of the opinion, I'm going to overrule your objection, Mr. Hagler, and find that Ms. Thomas, or Dr. Thomas is qualified to render an opinion, relative to the process by which the evaluate – the

opinions reached by Doctors Hynan and Hatcher came about.

So within that limitation, she is so qualified, and I will permit her to be questioned and cross-examined in those areas.

* * *

THE COURT: Yes. And by the way, I would also note too, although, Mr. Hagler, you said, it's – all of her opinions are, in general, beyond that which [63] the Court is to consider in the custody evaluation or custody determination, if I look at Section 5/602, Best Interest, while it is not one that's specifically listed in the eight, the prefatory language to the – the listing says that the Court shall determine custody in accordance with the best interest of the child, shall consider all relevant factors, including, and then lists the eight.

So the process by which other evidence relating to one of the eight factors is arrived at, certainly fits into the – that category, as far as I'm concerned. But it will be a limited inquiry, Mr. Haskin, and I know – I know you understand what I mean by, limited inquiry, and if – if you go beyond and that it's objected to, I will stop you.

* * *

THE COURT: Okay. Thank you.

Dr. Thomas, you may resume the witness stand. And, Doctor, so you are clear, I have made a determination to qualify you as an expert in this case to render opinions that you have been disclosed to render.

THE WITNESS: Okay.

THE COURT: In other words, those contained in your report. In a general sense, those are opinions you have relative to the process by which Doctors Hynan and Hatcher did their evaluations, not an opinion that you may have relative to what should happen with regard to custody in this case.

THE WITNESS: Mm-hmm.

THE COURT: Or not – more general opinions that you may have that may – either I may have asked you that you had or that either of the attorneys may have asked you about already. The scope of your disclosed opinion and the only scope in which, at this time, I am [66] qualifying you as an expert to testify about, are in the nature of the processes by which the two evaluation reports that you reviewed were prepared –

THE WITNESS: Okay.

THE COURT: – and so forth. So as long as we're clear on that, the attorneys are clear on that, they're not supposed to ask you about anything else, and I would ask that you not volunteer any answers in any areas beyond the areas of the questions you are asked, okay?

THE WITNESS: Okay.

THE COURT: All right, thank you.

* * *

APPENDIX I

THIS APPEAL INVOLVES A QUESTION OF CHILD CUSTODY, ADOPTION, TERMINATION OF PARENTAL RIGHTS OR OTHER MATTER AFFECTING THE BEST INTERESTS OF A CHILD

No. 2-05-0971

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

IN RE: THE MARRIAGE OF

CHRISTOPHER M. GAMBLA,

Petitioner-Appellant,

and

KIMBERLY K. WOODSON,

Respondent-Appellee

Appeal from the Circuit Court of the
Eighteenth Judicial Circuit DuPage County, Illinois
Circuit Court Case No. 03-D-1116
The Honorable C. Stanley Austin, Judge Presiding

BRIEF AND ARGUMENT OF PETITIONER-APPELLANT

BOOK 1 of 2

(Filed Nov. 23, 2005)

CHRISTOPHER M. GAMBLA
1325 Nagel Court
West Chicago, Illinois 60185
(630) 562-9407 – phone
(630) 562-9408 – fax

Petitioner-Appellant *pro se*

ISSUES PRESENTED FOR REVIEW

I. Whether the Circuit Court erred in ruling as a matter of law by unreasonably relying upon unqualified expert testimony and opinions concerning child custody.

II. Whether the Circuit Court erred in ruling as a matter of law permitting expert testimony of Dr. Thomas without it being generally accepted by the relevant scientific community.

III. Whether the Circuit Court erred as a matter of law considering race as a factor in determining child custody, thereby denying Christopher's right to equal protection under the law.

IV. Whether the Circuit Court erred as a matter of law allowing the question of race alone to outweigh all other considerations and be decisive on the question of child custody.

V. Whether the Circuit Court erred in ruling as a matter of fact awarding custody of the parties' minor child to the Respondent-Appellee.

VI. Whether the Circuit Court erred in ruling as a matter of law failing to consider all relevant factors in its determination of custody.

* * *

APPENDIX J

[LOGO] DANIEL J. HYNAN, PH.D., R.C.E., D.A.B.F.E.
Clinical Psychologist

February 19, 2003 [sic]

Transmitted via facsimile number (630) 682-6866
The Honorable C. Stanley Austin, Presiding Judge

Transmitted via facsimile number (312) 807-4782
James Hagler

Transmitted via facsimile number (630) 665-8630
Maureen Sullivan Taylor

Re: Case of Woodson v. Gambla, No. 03 D 1116

Dear Judge Austin and Counsels:

The evaluation has been completed. The full report follows.

Sincerely,

/s/ Daniel J. Hynan, Ph.D. (ccb)

Daniel J. Hynan, Ph.D.

Diplomate of the American Board of Forensic Examiners
Board Certified Forensic Examiner
Fellow of the Professional Academy of Custody Evaluators
Fellow of the American College of Forensic Examiners
Registered Custody Evaluator
National Register of Health Service Providers in Psychology
Certified Substance Abuse Provider

DJH:ccb

Attachment

[Address Omitted In Printing]

[LOGO] DANIEL J. HYNAN, PH.D., R.C.E., D.A.B.F.E.
Clinical Psychologist

February 19, 2004

Evaluation Report

Case of Gambla v. Woodson

Case No. 03 D 1116

Pending before Judge C. Stanley Austin

Status date: February 23, 2004

Child: Kira Gambla

Date of birth: 10/19/02

Procedures

10/01/03	Interview – Christopher Gambla
10/11/03	Interview – Kimberly Woodson
10/15/03	Interview – Mr. Gambla
10/16/03	Observations – Ms. Woodson with Kira
10/20/03	Observations – Ms. Woodson with Kira
10/29/03	Interview – Mr. Gambla
11/05/03	Observations – Mr. Gambla with Kira

11/08/03	Interview and psychological testing – Ms. Woodson completed the Minnesota Multiphasic Personality Inventory-2 and the Adult-Adolescent Parenting Inventory.
11/19/03	Interview – Mr. Gambla
11/22/03	Observations – Mr. Gambla with Kira
11/26/03	Interview – Mr. Gambla
12/03/03	Interview – Mr. Gambla
12/06/03	Interview and psychological testing – Mr. Gambla completed the Minnesota Multiphasic Personality Inventory-2 and the Adult-Adolescent Parenting Inventory.
12/15/03	Interview and psychological testing – Catherine Morello completed the Adult-Adolescent Parenting Inventory.
12/16/03	Interview and psychological testing – Arline Gambla completed the Adult-Adolescent Parenting Inventory.
12/20/03	Interview – Ms. Woodson
01/05/04	Observations – Ms. Woodson with Kira and Che Woodson
01/26/04	Extended interview (2.25 hrs.) – Ms. Woodson
01/26/04	Telephone conference – Linda Dorsey
01/26/04	Telephone conference – Selene Mayer
02/04/04	Telephone conference – Kamilah Mitchell
02/04/04	Telephone conference – Marion Woodson
02/04/04	Telephone conference – Tami Spicer

Review of intake documents
Review of records

Background Information Agreed Upon by the Parents

Information in this and all other sections is a summary. It is not productive to restate all of the assertions of the parties, and all the other information reviewed as part of this evaluation.

The parents were married in May of 2002, and continued to reside together through the end of the current evaluation. Kira is the only child they have had together. Ms. Woodson has not had any other marriages, but has a son from a prior relationship, Che. He is eight years old, and was living with Ms. Woodson and Mr. Gambla until May of 2003. Since that time, he has been residing out of state, currently in North Carolina, with relatives of Ms. Woodson. Mr. Gambla has not had any other marriages or children.

Ms. Woodson has been a full time homemaker. Mr. Gambla has been employed as a consultant in the rail transit industry by Lea & Eliott [sic], since 2001.

Ms. Woodson has a sister, mother and niece who reside in the Charlotte, North Carolina area. Her son, Che, resides with her niece there. Her father is deceased, as is a brother. Also, she has a sister in New Jersey, one in Georgia, and one in Texas. Mr. Gambla has family in the West Chicago area. Specifically, he reported that a sister, brother-in-law, and their three children, together with his mother reside together in a home in West Chicago. He also has another sister in the Chicago metropolitan area.

The Order for the current evaluation includes issues of custody, visitation, and removal. More specifically, Ms. Woodson has asked to move out of state with Kira and reside very near her family in North Carolina. Once she would potentially do so, her son would live with her and her daughter.

Background Information Contested by the Parents

There are many areas of disagreement for the couple, though Ms. Woodson repeatedly emphasized her perspective that she has been Kira's primary caretaker, including breastfeeding her through the current time. The mother indicated that she does not have any support system in this geographical area, but would have considerable family available in the Charlotte, North Carolina region. In that area, her niece, sister, and mother reportedly reside. Her son, Che, has been living with her niece there for a number of months. In addition, she said that she has an offer of a good job there, as a nurse. She said that there is a good cost of living in that area, as well of [sic] other aspects of a positive quality of life. Ms. Woodson asserted that her husband could maintain a good deal of contact with Kira, if removal to North Carolina took place, through monthly and extended summer visits.

The mother stated that her husband allotted decreased attention and focus toward her son around the time he filed for divorce, and consequently she decided it would be better for the child to move out of that living situation. For a period of time, she had Che reside with family in Georgia, but moved to North Carolina to be with family prior to the beginning of the current academic year. She said it had been very difficult for Che that Mr. Gambla had not continued to be active with him. In addition, Ms. Woodson contended that her husband initiated a number of actions regarding Kira without having consulted her. For example, she said that he began to feed Kira infant formula, fluoridated water, and non-vegetarian food without having consulted her. In addition, she said that he had changed the medical doctor for Kira without any discussion with her. Furthermore, she said the Mr. Gambla appeared to be

uncomfortable in terms of being Caucasian and interacting with her African-American circle of family and friends.

In response to her husband's assertions of her having been physically aggressive to Che's father, she said that she needed to do so on only one occasion when he was acting in such a manner so as to give her the impression that he was restraining her movement. She also said that she had not initiated physical aggression toward Mr. Gambla, despite his assertion that she had done so on two occasions, one of which involved him allegedly holding Kira at the time. In response to his statement that she had not followed medical recommendations for the children, about matters such as inoculation and fluoridated water, she replied that her husband is very focused on convention [sic] medicine, whereas she is more open to comparatively alternative medicine. She added that she is very well informed and concerned about health matters associated with her training as a nurse. Ms. Woodson indicated that she had stated to her husband, not long before the current evaluation had ended, that she might be open to reconciling, though she expressed considerable concern that there had been no response at all from him about that. She added that she saw her husband as generally a good father, but also as overly critical and controlling, including towards her and the children. She added that, on two occasions, his controlling behavior precipitated a brief physical altercation between the two of them.

The father contended that he actually has been the primary caretaker for Kira for a number of months, in terms of time spent with her. He said [sic] that sleeps in the same room as Kira, and thus gets up at night with her. He said that he also has time with her during the week when he is not at work, and has her each weekend. Mr. Gambla

maintained that his parenting covers all areas of Kira's parenting, obviously other than breastfeeding. He asserted that his wife's breastfeeding of Kira has not been very consistent, and he voiced a belief that she continues it largely to try to obtain an advantage in the custody dispute. Also, he described that he functioned as an active and loving father for Che, for a considerable period up until the child moved away to live with his wife's relatives. He stated that he had been more active than his wife in attempting to actively cope and assist Che when he voiced suicidal feelings and was manifesting behavioral problems at school. He voiced a point of view that his wife had removed him out of Che's life, and vice versa, and he said that he has tried to stay connected to Che through such means as sending him correspondence (through his wife) and sending a letter to the child's therapist, with an offer to be of assistance in whatever way he could. Mr. Gambla expressed considerable concern that his wife would have Che live away from her for a considerable period, after the child reportedly had expressed considerable distress that Ms. Woodson was much more attentive to Kira than to him.

Mr. Gambla stated that his employer has assured him that he would be able to maintain a residence in his current geographical area, and would not have to relocate in any event. He stated that his employer is very considerate of his family focus and obligations, and he said he would [sic] have to travel much for work.

He reported that his wife had been physically aggressive towards him on two occasions, and reportedly also had been physically aggressive towards Che's father. In one incident, he said that his wife hit him with a shirt while he was holding Kira, though Ms. Woodson stated that she

simply had thrown some material in the direction of a bed, and it inadvertently hit him, and she added that her recall was that he had not been holding Kira at the time. In another incident, Mr. Gamble claimed that Ms. Woodson had pushed him with both hands into a computer and a wall. Ms. Woodson said that he had been trying to push his way into the bedroom through the door, she had been trying to keep him out, and in pushing both the door and him to accomplish that he lost his footing and fell into the computer and the wall. Ms. Woodson said that she had hit Che's father only once when he was moving in such a way as to block her departure.

Also, Mr. Gambla voiced a point of view that his wife had worked to keep Kira away from him through traveling to see her family, and not making provisions for him to see the daughter. In that regard, he indicated that he is very afraid that his wife would, at least over time, greatly and excessively limit his access to Kira if she had custody and were allowed to remove the daughter from Illinois. He described that he would provide Kira with a great deal of stability and security if he had primary possession of her. Specifically, he said that he and relatives together own a house in West Chicago. He would move to that house where his sister, brother-in-law and their children also reside, and his mother lives there in an apartment with a separate entrance on the lowest level. He said it would be a very positive environment for Kira, he would work primarily from a home office, and his sister would be the main person to care for Kira when he would not be able to do so. He added that he would promote considerable diversity regarding Kira's upbringing, and in that regard, noted that West Chicago has a considerable Hispanic population.

Parents

In a clinical interview, Ms. Woodson indicated that she experienced depression after having delivered Kira. She had received therapy focused on her depression, though decided not to pursue medication because she was breast-feeding. She said that she has not used alcohol at all in recent months. Prior to that time, she said that she consumed alcohol one or two times per week, and typically had one drink per occasion. She said she has never used drugs other than alcohol, and she does not smoke cigarettes.

Ms. Woodson completed the Minnesota Multiphasic Personality Inventory-2, a measure of emotional and personality functioning. On that measure, she answered questions in a somewhat defensive manner. The type of defensiveness she manifested was more similar to those who have limited insight about themselves, than to others who make a purposeful effort to present themselves in a positive light. Despite her defensiveness, she had a significant elevation on a scale that represents impulsiveness, difficulties with authority, and limited frustration tolerance. She had an elevation on a supplementary scale that represents the use of repression as a psychological defense. There was an elevation that was close to the standard cutoff point on a scale that measures relatively long-standing personality characteristics that include low impulse control. Such an elevation that approaches the standard cut off point is often seen as clinically significant in the context of a defensive response pattern.

Ms. Woodson also completed the Adult-Adolescent Parenting Inventory, a measure of parenting attitudes and beliefs. She scored in the better than average range on

scales that measure empathy, disciplinary style, and maintaining an appropriate parental role. She scored in the average range on a scale that measures the appropriateness of developmental expectations. However, her defensiveness, as indicated on the other measure, calls into question the full validity of her answers on this parenting measure.

In a clinical interview, Mr. Gambla said that he has not experienced significant psychological problems, though has felt distressed when romantic relationships have broken up, including the deterioration of his marriage. He stated that he and his wife had couples counseling with a priest prior to marriage, and that he participated briefly with his wife's therapist. He said that, prior to the start of the divorce, he consumed alcohol about once per week, and typically had one glass of wine per occasion. He said that, since the divorce began, he has only consumed non-alcoholic beer. He stated that he used marijuana five to six times when he was in college, and estimated that his last use was during those years, and that he had never used any other drugs. He said that he does not smoke cigarettes.

Mr. Gambla completed the Minnesota Multiphasic Personality Inventory-2, described above. On that measure, he answered questions in a highly defensive manner, which leads to a conclusion that answers on clinical items and scales are not valid. He had elevations on supplementary scales that represent beliefs about social responsibility and working actively on controlling his anger, though such elevations are likely due, in large part, to his overall defensiveness.

As noted above, the father completed the Adult-Adolescent Parenting Inventory. He scored in the better than average range on the scales described above. However, his defensiveness, as indicated on the other measure above, calls into question the validity of his answers on this parenting inventory.

Each parent was observed interacting with Kira while carrying out semi-structured tasks. An additional such session was established when Ms. Woodson was able to have Che with her, so as to have an opportunity to observe Kira and Che interact. Overall, the parent-child interactions went well in all sessions. More specifically, there were not significant differences between the sessions with the mother and those that included the father on any relevant dimension of parent-child interaction. It is noteworthy that Che and Kira interacted with one another in a happy and affectionate manner in the session in which he was present. Similarly, there were very positive interactions between Che and Ms. Woodson.

The parents were interviewed about their plans and provisions for Kira's care and oversight when they might not be able to be directly with her, because of work or some other circumstance. Ms. Woodson stated that her niece is having a baby, and that the niece and her could perhaps share a nanny. Otherwise, she stated that she would look into a childcare center. She noted that other family members in the Charlotte area would be able to assist as well. Also, she emphasized that the nursing position she was offered involved her likely working long shifts mostly on weekends, and thus allow her to be directly available for Kira a good deal of the time. She indicated that she and her children would reside in their own home, but would have considerable contact with the family. In other words,

she would plan to purchase a home in the vicinity of her family. Mr. Gambla said that his sister with whom he would live would care for Kira during work hours that he might not be able to watch her directly. He believed that Kira would benefit from his immediate availability working out of the home. For a period of time, while Kira was very young, he would continue to share a room with her, though later Kira would change and share a bedroom with her cousin Anna, with whom she reportedly has a very positive relationship.

Child

Based on the observation sessions, described above, Kira appears to be healthy and developing well. Perhaps obviously, based on her age and stage of development, it was not possible to conduct any interviewing with her.

Kira has received medical care at Wheaton Pediatrics. Information from that clinic was requested and reviewed. Some of the information reflects disputed matters regarding parental preferences. Both parents stated that Ms. Woodson believed it was not necessary for Kira to consume fluoridated water, whereas Mr. Gambla stated that he obtained information that it would be good for Kira. A note from that clinic said that a physician indicated fluoridated water should be used for juice, while breastfeeding was taking place. Other notes reflected issues that pertained to immunization, use of Tylenol, use of a breast pump, and yet a majority of the material pertained to typical health care information for a very young child that did not appear relevant for the current case. It is noteworthy that the parents voiced a degree of disagreement about the use of Tylenol, with the mother stating that she preferred to use

other methods to ease Kira's pain associated with teething, and that the father described that he also used other methods, but followed the doctor's recommendation to use Tylenol as needed. As indicated above, there have been parental disagreement about the extent and necessity of breastfeeding, and these records do not give any clear indication about what should or should not occur in that regard. Mr. Gambla submitted a copy of a brochure entitled "Newborn Care Guidelines" from Wheaton Pediatrics. It stated fluoride supplement was essential for tooth development, and he also submitted a copy of an email to his wife that described the rationale and necessity of including fluoride.

Review of Other Information

Considerable other information was reviewed, and Mr. Gambla submitted the vast majority of it. Some of that information pertained to disagreements about handling medical matters with the children. For example, both parents indicated they had different points of view about immunization, with Mr. Gambla preferring to follow recommendations of conventional medicine, and Ms. Woodson expressing concern about possible negative effects of immunization, especially more than one at a time. Records submitted by the father suggest that Kira received immunizations, but sometimes later than the recommended time frame, and he emphasized that his assertions that the daughter should be immunized were important in having them take place. Ms. Woodson stated that her preference was to not "bombard" a child's system, and allow their immunities to develop more naturally. Mr. Gambla also submitted information that indicated that the

mother had refused erythromycin ointment for Kira after her birth.

Some of the information submitted pertained to Che. Che's health status, and possible need for services, was included in these considerations. For example, the father submitted information that Che suffered from an ongoing skin condition, but that the mother expressed reluctance to follow some of the medical recommendations for it. Some of the reported medical records regarding Che stated that he had not been immunized, and that the mother was reluctant to use an antibiotic to treat his pneumonia. At another point, concern was expressed that Che was not gaining weight well enough. These medical references to Che were from a number of years ago.

More recently, there had been concern about Che's emotional and psychological condition. Both parents stated that his school reported that he was having difficulty controlling his behavior in class. At one time at school, and at another point with Mr. Gambla, Che reportedly had expressed suicidal inclinations. Both parents appear to have met with school personnel. Mr. Gambla indicated that he was the primary person responsible for initiating diagnostic and treatment services for Che, both with a psychologist and a pediatric neurologist. The latter individually diagnosed Che with having an attention deficit disorder, and placed him on medication for it. The mother expressed concern that the physician seemed to have come to that diagnosis in a very quick period of time, with relatively little information, and she said that she became uncomfortable with continuing medication after a relatively brief time. More recently, the mother and her family have taken Che to see a clinical social worker in North Carolina, Mr. Schulman. Requests for information were

sent to his office. He did not send information, but left a telephone message that stated he did not wish his work to become involved in the court matters. However, his telephone message stated that he had seen Che intermittently, typically with family, with a focus on his adjustment to the North Carolina area. That is, Mr. Schulman stated that he had not seen Che intensively or individually. The mother had described that Mr. Schulman stated that Che was making a good adjustment and there was no further need for services.

Ms. Woodson submitted some school-related information about Che. One of the documents submitted stated that he had been nominated to be evaluated for a program for gifted students. Information from the school indicated that Che was doing well in a number of ways, though was continuing to manifest some difficulties. In most areas, he was rated as doing well, though continuing areas of concern included assuming responsibility for himself, disrupting others, and sometimes being physically aggressive. The most recent update, from December, 2003, indicated that he was "doing better with his behavior. He still has some off days, but he is getting better at getting himself under control."

Both parents submitted some information about the Charlotte, North Carolina area as compared to the West Chicago, Illinois area. Ms. Woodson initially emphasized that the cost of living was considerably lower in North Carolina, though she also acknowledged that the pay level tended to be lower there for nurse positions than for the Chicago metropolitan area. The parents had submitted some information about schools, though direct comparisons could not be meaningfully made. It is noteworthy that Ms. Woodson said that she wished Kira to attend public

school, whereas Mr. Gambla said that he wanted Kira to attend St. Irene Catholic School in Warrenville.

As noted above, Mr. Gambla submitted a considerable amount of information, and it is not possible to cover it all in this report. One of the pertinent areas of disagreement had been the conflict between the parents. Mr. Gambla submitted a copy of a police report that was done after he had contacted the police subsequent to the incident between the two of them in July, 2003. On a police report form, he described the incident in which the mother reportedly hit him with a shirt or piece of material, and he stated that it occurred in about December, 2002. He said that he did not file a police report at that time for concern that it would only further inflame the situation. Ms. Woodson's view of that interaction is described above, and she left a telephone message that indicated she believed it actually occurred the day she got home from the hospital after having delivered Kira. Mr. Gambla submitted copies of what he stated were letters from Che's biological father, written to Ms. Woodson, with references to her having hit him. As noted above, Ms. Woodson maintains that it occurred on only one occasion, when he allegedly was trying to restrict her movement around him.

Both parents submitted lists of contact individuals who could speak either to their parenting, or as general character references. Telephone conversations occurred with Marion Woodson (Ms. Woodson's mother), Linda Dorsey (Ms. Woodson's sister), Kamilah Baldwin Mitchell (Ms. Woodson's niece) and Selene Mayer (a friend of Ms. Woodson). They all described Ms. Woodson and her parenting in very positive terms. Some of them had known Mr. Gambla, as well, and generally described him in positive terms. Regarding Mr. Gambla, a telephone conversation

had occurred with Tami Spicer, a former work colleague. Also, letters were received via facsimile from Rajkumar Rambhajan and Olivier Rogues, both former work colleagues. They all spoke very positively of his character, and his clear concern about family. Mr. Rogues seems to have had opportunities to observe his parenting directly.

As noted above, two of Mr. Gambla's family members participated directly in the evaluation by coming in for interviews and completing psychological testing. Mr. Gambla's sister, Catherine Morello, and his mother, Arline Gambla, reported a perspective that was very similar to that of the father. They indicated that they both had made considerable efforts to be welcoming and supportive to Ms. Woodson. In fact, for a period of time, Ms. Woodson and Mr. Gambla resided with them. They stated that Ms. Woodson was very pleasant, though appeared quiet, private and somewhat withdrawn. Both voiced a perspective that Mr. Gambla, on a number of occasions, had appeared more actively involved with Che than did Ms. Woodson. Both the mother and the sister voiced a perspective that it would work very well for Mr. Gambla to move into their home with Kira. Each of them indicated that Mr. Gambla clearly is the primary caretaker for Kira, and he would continue to do so. Ms. Morello would be the other main individual to care for Kira when Mr. Gambla was not directly available, and Ms. Gambla would less often assume such responsibilities. They emphasized that there is more than enough room in their home, and there are positive interactions between Kira and all the family members, including Ms. Morello's children.

Ms. Gambla completed the Adult-Adolescent Parenting Inventory, described above. On that measure, she scored in the better than average range on the scales described

above. Also, Ms. Morello completed the same inventory. Similarly, she scored in the better than average range on the scales described above.

There were other contact individuals identified by both parents. In some cases, messages had been left, but contact had not been completed by the time the current report was completed. In some other cases, there was not adequate opportunity to initiate contact in the time frame of completing the evaluation.

Recommendations

It is recommended that Mr. Gambla have primary residential care and sole custody of Kira. Perhaps obviously, accompanying this recommendation, it is recommended that Ms. Woodson not be allowed to remove Kira from the state of Illinois.

A visitation schedule should be put into effect that is quite clearly structured. However, the specifics of the structure would depend in large part on parental availability. For example, it is assumed, but not known with certainty, that Ms. Woodson would remain in the current geographical area if Kira is in the primary residential care of the father. Also, it is acknowledged by both parents that Ms. Woodson would need to pursue employment, probably on a full time basis or close to it. She has indicated that she intends to obtain a job as a nurse, and such schedules can sometimes be very different from standard work hours. In other words, the main question in terms of the visitation schedule pertains to the mother's direct availability. In general, a visitation schedule is recommended in which the mother would be able to have Kira approximately 12 days per month. Perhaps obviously, that would be the approximate

equivalent of extended alternate (four-day weekends), plus one overnight per week.

Rationale for Recommendations

Section 602 of the Illinois Marriage and Dissolution of Marriage Act indicates that custody needs to be determined in accordance with the best interest of the child. It lists factors to be considered in that determination. Below, those factors are described, followed by material relevant for the current case.

The wishes of the parents as to custody: Both parents indicated that they wished to be the primary residential custodian. Both indicated that they had requested sole custody. Ms. Woodson stated that, at the same time, she hoped they would be able to make major decisions together jointly. Initially, Mr. Gambla indicated that he wished to share joint legal custody with his wife, but shortly thereafter changed his preference to sole custody. In the considerable material he submitted, though it was not very clear, it sounded like he might be open to joint parenting.

The wishes of the child as to the custodian: In all cases, I do not ask a child with whom they would primarily like to live, as this can place an inappropriate emotional burden on a child. In addition, at Kira's age and stage of development, she is not cognitively or verbally adept to understand or respond to such an inquiry.

The interaction and interrelationship of the child with the parent or parents, siblings, and any other person who may significantly affect the child's best interest: This is a broad area that overlaps with some of the other factors. Overall, Kira has a good relationship with both parents. Both

parents appear to manifest parenting competencies in many areas. There are concerns about the beliefs and actions of Ms. Woodson in terms of health care for children. With a child as young as Kira, as well as older children, part of the relationship pertains to the care taking regarding health. Overall, Ms. Woodson's stated skepticism about conventional child health care, including matters of immunization and using fluoridated water, without any clearly stated scientific basis for her concerns, leads to a risk that she might not attend to such matters with Kira in an optimal way. That is, she seems to inadequately consider the possible negative impact of not following such conventional medical recommendations. In contrast, Mr. Gambla appears more diligent in this regard. The interactions between Kira and Che were consistently positive during the evaluation session. Also, there is information that Che appears to be making some improvement in his behavior. Therefore, there does not appear to be any need for short-term worry that Che would have a negative impact on Kira. At the same time, concerns remain about Che's functioning. School information indicates that some problems continue in terms of attention, disruptiveness, and aggression with peers. The very minimal information obtained from Mr. Shulman suggests that he has not had intensive therapeutic services directed toward Che, and it is unclear whether he is aware that Che had previously voiced suicidal inclinations. In this regard, there is a reason for concerns about Ms. Woodson's diligence in terms of health care for her children. In other words, the mental health services for Che appear to have been less than thorough given that child's recently presented problems. Therefore, there is reason for concern that Ms. Woodson may not be sufficiently active in pursuing health services for Kira in the

future, both as they pertain to possible future physical and psychological health needs. Again, there is a noteworthy contrast that Mr. Gambla appears to have been more active in pursuing mental health services for Che when the child was still in this area. There appears to be a reasonable relationship between Kira and the family members of Mr. Gambla. When asked, Ms. Woodson voiced that she did not have any concerns about Kira's interactions with any of the individuals in the West Chicago household, and believed that the visits there had consistently gone well. Also, it appears that Mr. Gambla's work travel responsibilities are reasonably modest.

The child's adjustment to home, school and community: Kira appears to have reasonable adjustment to her primary home with both parents in Wheaton, and as noted above, and appears to have done well during visits in the West Chicago home where she may reside in the future. She is not yet in school, and her age precludes much involvement in the larger community.

The mental and physical health of all individuals involved: The defensiveness of both parents leads their mental health functioning to be less clear than would be optimal. At the same time, there are a number of indications that Ms. Woodson has difficulties with impulse control. Although it may not be possible to ever get a clear and accurate picture of the alleged physical aggression that occurred, it is troublesome that there appear to be a number of instances that involve Ms. Woodson, including outside her relationship with Mr. Gambla. There is no evidence or allegation that Mr. Gambla has had problems with physical altercations outside the disputed incidents with Ms. Woodson. Mr. Gambla manifests some obsessive features, in that he is very focused on tasks and details.

However, it does not appear that these features are so intense as to constitute a disorder, and clearly some of the features are put to good use by Mr. Gambla. For example, although he presented material in this evaluation in extraordinary detail, in many respects his presentation was quite well organized and appropriately highlighted important features. That is, in many respects, he is able to put his task and detail orientation to productive use in life. This appears to include reasonable diligence about child health care. Neither Kira nor the parents appear to have significant health limitations. Although Che manifests reported improvement in his behavioral control, as noted above, there is concern as to whether his psychological difficulties have received enough attention. In that regard, it is also of concern that Ms. Woodson sent her son to live to [sic] relatives, where he reportedly has been since May of 2003. Although she said that she did so because Mr. Gambla had been paying less attention to him, and not speaking to him much since April, 2003, it is very conceivable that it has created some difficulties for the son to not be with his mother. Also, even after April, 2003, Ms. Woodson stated that Mr. Gambla had continued to be involved with Che such as reading to him, making him meals, attending to his skin condition, and pursuing health services for him. Thus, Ms. Woodson's judgment and decision making is somewhat questionable in this regard.

The physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person: There is no evidence or allegation of physical violence against Kira. Both parents report that, for a brief time, they agreed to use spanking as a disciplinary method for Che, when

many other methods had been failing, but they quickly changed their mind when that was also ineffective. As noted above, allegations regarding physical aggression by or between the parents remain very unclear, though it is troublesome that such events appear to have occurred in more than one relationship for Ms. Woodson.

The occurrence of ongoing abuse, whether directed against the child or directed against another person: There is no evidence or allegation of ongoing abuse.

The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child: Both parents voice willingness and ability to facilitate a good relationship between Kira and the other parent. Also, both have been participating in a routine in recent months in which Kira has good access to both parents. It would be more difficult for a close and continuing relationship to occur between the child and the father if the mother had primary residential care and moved out of state.

Section 602.1 pertains to joint custody. One of the factors to be considered is the ability of the parents to cooperate consistently and effectively in matters that pertain to parenting. Both parents report that, in recent months, there has been essentially no direct communication between them, even though they are living in the same home. Such a lack of communication is somewhat more noteworthy given that their attorneys reportedly have communicated about possible reconciliation. In addition, there are some important different preferences about whether Kira should attend a public versus parochial school. As also alluded to above, there have been significant disagreements over health care. Mr. Gambla describes

himself as a very active Catholic, and Ms. Woodson stated that she would like to have Kira exposed to a number of religious denominations over time. If there were to be joint parenting, the requirement for joint decision making would be too high a risk that the parents would not be able to agree when a potential decision would be important, such as about health care or education. Therefore, it is in Kira's best interest for the father to have sole custody.

Section 607 pertains to visitation. It is likely to benefit Kira to have a primary, stable home with reasonable contact with both parents. The description listed earlier considers that factor, plus some of the uncertainties of future parental availability.

The issue of removal from the State of Illinois is obviously intertwined with that of custody. Obviously, because it is in Kira's best interest to live primarily with the father, that would occur in Illinois, and removal would not occur.

Sincerely,

/s/ Daniel J. Hynan, Ph.D. (ccb)

Daniel J. Hynan, Ph.D.

DJH:ccb

APPENDIX K

[LOGO] *PSYCHCARE ASSOCIATES*

CUSTODY EVALUATION

CASE NAME: Christopher Gambla and Kimberly Woodson
CASE NUMBER: 03 D 1116 (DuPage County)
JDUGE PENDING BEFORE: The Honorable Stanley Austin

ATTORNEY FOR CHRIS GAMBLA: James Hagler, Attorney at Law
Fax No: (312) 807-4782

ATTORNEY FOR KIM WOODSON: Maureen Sullivan-Taylor, Attorney at Law
Fax No: (630) 665-8630

DATE OF REPORT: 6/14/04
EXAMINED BY: Roger P. Hatcher, Ph.D., Clinical Psychologist and Registered Custody Evaluator (RCE)

REFERRAL AND BACKGROUND INFORMATION: Upon the Petition of Kimberly Woodson's attorney, I was appointed to conduct a 604.5 custody evaluation of the minor child in this case, Kira Gambla (age 1½ years). Kira is the only child born to the marriage of Chris Gambla (age 36) and Kimberly Woodson (age 34). This matter was initially evaluated by Dr. Hynan and he submitted his 604(b) custody evaluation on February 19, 2003. Dr. Hynan recommended sole custody of Kira with her father and, further, recommended against Kim's Petition for sole custody and removal of Kira to North Carolina.

The history of this matter is as follows. Chris and Kim met in March 2000 in New Jersey, having been introduced by

mutual friends. They dated for two years, for the most part on a long-distance basis since Kim moved to Atlanta to attend a nursing program and Chris was job transferred to Texas. In any event, they saw each other when they could and Kim became pregnant with Kira in early 2002. Kim reports that this was an unplanned pregnancy while Chris, on the other hand, believes that the relationship was on the edge of a breakup and Kim became purposefully pregnant to salvage things. This was the first marriage for each of them, although Kim has an 8-year-old son from a prior unwed relationship (Che Woodson) who lived with them until mid-2003 when the marriage became quite rocky. Chris and Kim lived in West Chicago for about three months immediately after their marriage at the home of Chris' mother, but have lived continuously in their present Wheaton residence since September 2002. Kim's son, Che, has lived in North Carolina with relatives since last September.

Both parties agree that their marriage has been very troubled from the start. Kim reflected that "it's hard to say (what went wrong) – we just had different ways of communicating, and I felt I wasn't being accepted for the way I was, and he thought I wasn't being emotionally intimate enough". She recalled that "we struggled from the beginning" and they sought some marital counseling along the way but it proved unsuccessful. Chris, for his part, thought that Kim became immediately depressed and withdrawn after their marriage, although he was unaware of the reasons for her problems. Kim sent him a letter in September 2002 stating that she was unhappy with the marriage "and that she would understand if I wanted to get out of the marriage". He recalled that he was surprised by how quickly she came to the idea of a divorce and for

such poor reasons. He was aware that she had some minor complaints about living with his family in West Chicago initially and he promised that he would move them to a different house and try to "fix things". She seemed briefly better following his efforts but over time he noted that she became increasingly argumentative, angry and on one occasion she hit him with a shirt while he was holding Kira in December 2002 and told him "fuck you". Chris noted that Kim steadily became angrier with him and increasingly slammed doors, swore at him and refused his attempts at conciliation. Although there were no further physical attacks on him, he noted that she challenged him on several occasions to fight her (which he thought was ridiculous). In late May 2003 things were very tense in the marriage and Kim took Che and Kira to a family visit in Georgia for about three weeks. When she returned to Wheaton she immediately moved to the master bedroom (which Che had previously occupied) and informed him that Che was not coming back. Kim filed for divorce in April 2003 and since that time there has been an extreme amount of animosity within the household. There have been four Police Incident Reports in the past year, although there has been no direct physical violence or arrests for domestic violence.

PROCEDURES DONE: I conducted this evaluation in my usual and customary fashion and in accordance with the Custody Evaluation Guidelines of the American Psychological Association. Each of the parties was fully informed of the non-confidential nature of their disclosures and, further, that a full report would be made to the Court. Specifically, I met with the parties on the following occasions:

04/15/04 1 Hour Clinical Interview – Kim Woodson Parent Anser Questionnaire Completed for Kira and Che

04/16/04 1 Hour Clinical Interview – Chris Gambla Parent Anser Questionnaire Completed for Kira

04/21/04 1 Hour Clinical Interview – Kim Woodson Millon Clinical Multiaxial Inventory-III (MCMI-III) administered

04/22/04 1 Hour Clinical Interview – Chris Gambla Millon Clinical Multiaxial Inventory-III (MCMI-III) administered

04/24/04 1 Hour Observation – Mother-Child Play between Chris and Kira

04/28/04 1 Hour Observation – Mother-Child Play between Kim and Kira

04/29/04 1 Hour Clinical Interview – Chris Gambla

05/05/04 1 Hour Clinical Interview – Kim Woodson

In addition to the above interviews, observations and psychological testing, I reviewed a significant amount of collateral information in this matter:

- 604(b) custody evaluation by Dr. Hynan, dated 2/19/04
- Multiple pages of journal notes, letters, photos and other documents provided by Christopher Gambla to support his Petition for Custody
- Multiple pages of letters, journal notes and other documents provided by Kimberly Woodson to support her Petition for Custody

- Multiple letters and emails between Chris and Kim over the past year regarding their concerns and disagreements about Kira
- Several articles and books provided by Kim with regard to medical controversies about the use of fluoridated water for use in young children and potential problems with routine immunizations of children
- Clinical notes and letter of evaluation of Che Woodson by Dr. James Gioia, regarding two separate psychological consultations about Che in April 2003
- Telephone consultation with Clinical Social Worker Linda Parker, Kim's therapist during the period November 2002 through June 2003
- Seven letters of support and recommendation of Kim Woodson by friends and professional acquaintances she has known over the years

RESULTS: Kimberly Woodson is a 34-year-old woman who has been a stay-at-home mother with Kira for the past two years. Previous to Kira's birth she was a graduate student in a Master's Program in nursing in Atlanta. She has lived in Wheaton with Chris and Kira for the past two years.

Kim presented as an attractive, neatly dressed woman who was in good hygiene and was prompt for each appointment. She appeared thoughtful in her responses, fully cooperative and articulated her concerns about the divorce and custody struggle very well. She gave no evidence of significant psychiatric distress. Thoughts were logical and well-organized, there was no evidence of confusion or memory problems, and no evidence of excessive anxiety or

depression. Affect appeared somewhat guarded and blunted, and mood was subdued but appropriate.

Psychological test responses on the MMPI-2 administered in Dr. Hynan's office in November 2003 showed a mild level of guardedness on the K-Scale, but overall produced a valid test result. On the Clinical Scales of the MMPI-2 there was a single and significant elevation of the 4-Scale. Dr. Hynan commented that the test profile suggested a degree of behavioral impulsivity, difficulties with authority and problems with frustration tolerance. Indeed, this test profile is associated with significant characterological and self-control problems. Kim is likely seen by others as somewhat immature, narcissistic and egocentric. She likely has difficulties in empathizing with the needs and feelings of others and has significant problems with forming close or intimate attachments. Although she is likely to make a good first impression, and others may see her as outgoing and energetic, she also tends to be inwardly resentful, antagonistic when she feels mistreated and can be quite hostile in her interactions. However, Kim's feelings of anger and aggression are more likely expressed in passive and indirect ways rather than through direct physical attack or confrontation. Psychologically she is likely to experience feelings of sadness, worries about the future and chronic feelings of emptiness. Individuals with this test profile most frequently do not present with acute psychiatric disorders, but rather tend to receive diagnoses of personality disorders, either as Passive-Aggressive Personality Disorder or Antisocial Personality Disorder.

Test results on the MCMI-III administered in this office were well within normal limits on the Modifying Indices Scales of the test, thus indicating that she responded to

the test questions in a generally forthright and honest fashion. Similar to the MMPI-2 test results there were no findings of significant psychiatric disorder, such as depression, anxiety, thought disorder or major mood disturbance. There was, however, a significant elevation of the Narcissistic Personality Scale of the test, indicating findings consistent with prior testing on the MMPI-2. Again, this is an individual who likely does not present with acute psychiatric distress, but rather has longstanding and maladaptive characterological problems. These are mostly evident in her difficulties with empathy, the development of close relationships, a tendency to put her own needs ahead of others and an attitude of entitlement which often puts people off.

Chris Gambla is a 36-year-old man who was alert, appropriately and neatly dressed, and prompt for each appointment. He is clearly anxious about the ongoing custody and divorce litigation and he was very articulate in expressing his concerns about it. Affect was congruent with the situation and mood appeared normal and responsive. There was no indication of thought disorder, confusion or major psychiatric impairment. He does tend to be a rather carefully organized, compulsive individual who provided reams of written documentation during this evaluation and tended to scrutinize every response or comment of the examiner. That being said, there was no evidence of any major psychiatric distress or concern during clinical interview and mental status examination.

On the MMPI-2 administered in Dr. Hynan's office in December 2003, Chris showed a mild level of defensiveness in his responses to the test questions. However, this is not unusual in the context of a Court-Ordered Evaluation and, in any event, did not invalidate the overall test

result. On the Clinical Scales of the MMPI-2 there were no significant elevations which might indicate any particular area of psychiatric concern.

On the MCMI-III administered in this office, his test responses were again generally open and non-defensive, and he produced a valid test result. There were no indications of personality pathology or major psychiatric disorder on the MCMI-III. On the Personality Patterns Section of the test there was a significant elevation on the Compulsive Personality Subscale, again suggesting that this is an individual who tends to be tightly controlled, somewhat obsessive in his response style and can be overly attentive to minor details. This may be a great benefit to many people in their chosen fields of endeavor, since Chris is unlikely to be "forgetful" or irresponsible in carrying out his assigned duties. However, when taken to extremes this may be quite irritating to others in their relationships with him, especially when he overresponds to relatively minor concerns. That being said, there is no evidence of recklessness or behavioral impulsivity, or any evidence that he is likely to act out physically when his is upset.

Kira is a 20-month-old child who appeared normally sized and adequately nourished during this evaluation. She was inquisitive, appropriately interested in the play materials and spontaneously named many of the toys and objects in the room around her. The parents report that she is healthy, affectionate and quite sociable with friends and family.

During this evaluation Kira was seen in two separate play sessions, once with each of her parents. On both occasions she was neatly dressed, well-groomed and clearly comfortable with the parent who brought her. During the play

session she was attentive, verbal and interactive, and she seemed to enjoy age-appropriate play activities involving simple building activities, repetitive actions and noisy verbalizations.

Both parents appeared comfortable and well-used to playing with Kira. The mother tends to interact with Kira in a quiet, soft-spoken fashion and laughed easily with her during play. She has a quiet and attentive demeanor, and Kira was both comfortable and affectionate with her throughout the session. The father has a more outgoing parenting style, tending to be more verbal and "instructive" in their play activities. However, he was consistently affectionate, playful and engaged with Kira throughout the play session, and Kira clearly enjoyed herself.

STATED PLANS FOR CUSTODY OF EACH PARENT: Kim reports that she has changed her mind regarding her Petition to move to North Carolina since the issuance of Dr. Hynan's report. She stated that she is aware that such a move would make it difficult for Kira to enjoy a fully committed relationship with her father and, as a result, she intends to stay in Illinois. However, she states that she would likely not live in Wheaton, since she would prefer to live in a more "diverse community", such as Homewood, Oak Park or Evanston. She feels that this would be a more comfortable community setting for Kira since Kira is a biracial child. She will purchase a home in whatever community she settles in once she has sold her home which she owns in Georgia. Her Georgia residence is not currently on the market, but she intends to put it on the market soon.

Kim also recognized that Chris will likely stay in West Chicago and, as a result, "we'll need to commute for

visits". She has to balance the length of the visitation commute with her preferences for a particular community in the Chicago area that suits her needs for diversity, quality of schools and other factors.

Kim would prefer to start Kira in a Montessori school program in her early school years but then would be "OK with public schools if the schools are good". She will also consider private schools in the community where they live. She is aware that she and Chris agreed to baptize Kira Catholic and, further, that Chris intends to raise Kira in the Catholic religion. She stated that she is open to Chris sharing the Catholic religion with Kira but "I would also like Kira to share church with me too".

With regard to her plans for medical and dental care, she indicates that she would find a pediatrician and dentist in the community to which she eventually moves, and that these professionals would have attitudes similar to her own about pediatric care. Specifically, she is aware that Chris has alleged that she is neglectful of Kira because she opposes vaccinations and fluoridated water. However, she denies that this is the case, only stating that she has a non-conventional attitude that is also supported by several medical professionals around the country with regard to issues of vaccination and fluoridation. She provided several articles and books supporting her position. That being said, she is fully aware that she and Chris have very divergent views about medical and dental care issues for Kira.

With regard to visitation, she would like to see a regular and frequent schedule of visitation between Kira and Chris, and she would be happy with a schedule of alternating weekends and one weeknight visit.

Chris, for his part, plans to remain living in the family residence in West Chicago (he is half-owner of that residence with his sister) and he provided photographs of both the interior and exterior of the home. He intends to continue with his present employment as a transportation consultant and his work hours will remain the same (8 AM to 5 PM daily). He would have the advantage of relatives within the household who could help in the care of Kira when he is at work, either his mother or his sister.

With regard to school issues, he intends to enroll Kira in a local Catholic school in Warrenville and he provided significant information about that school during this evaluation. He also intends to raise Kira as Catholic, noting that she has already been baptized and that even now he takes her to Mass at times when he attends on Sundays.

With regard to Kira's pediatric care, he intends to switch her over to his family practice physician (Dr. James Carson) in Wheaton.

Chris has no difficulties with a regular and frequent schedule of visitation for Kira with her mother, including alternate weekends and overnight once during the week.

COLLATERAL INFORMATION: I reviewed extensive documents provided by Chris, including a history of his concerns about Kim's depression and emotional lability over the past two years, plans for his custody of Kira, concerns about Kim's medical/dental judgments about Kira, and his worries that Kim attempts to keep Kira from him.

Kim also provided a significant amount of information about the problems within their marriage and her concerns about Chris, especially difficulties with the two of

them cooperating around the needs of Kira (for example, medical, dental and religious disagreements). She noted that the two of them have had a high-conflict relationship from the start of their marriage, frequently arguing about her having male friends, political comments that she made, criticisms about her housekeeping, arguments about religion, disagreements about living in an integrated community, disagreements about Che's behavioral and adjustment problems, and longstanding problems in their sexual relationship. Although she acknowledges that they have different parenting values and attitudes, she provided significant information about her professional background in nursing and her experience as a primary parent for her older son.

I also reviewed letters from various friends and professional associates of Kim's, all of whom highly recommended her as an ethical, upstanding woman who is an excellent mother.

Four separate Wheaton Police Department Reports were reviewed regarding incidents between 7/1/03 and 4/6/04 involving disputes between Chris and Kim. There was no evidence of domestic violence and no arrests made.

Dr. James Gioia, a psychologist in Wheaton, consulted with Kim and Chris in 2003 regarding Che's behavioral and adjustment problems at school and in the community. Dr. Gioia noted that Che had significant problems with attention and distractibility, and he recommended psychotropic medication and behavioral management counseling.

I reviewed the clinical notes of Linda Parker, LCSW, the therapist who saw Kim during the period November 2002 to June 2003. She also had a joint session and a separate session with Chris during that time period. Ms. Parker

indicated that Kim was referred by her doctor because of postpartum depression problems and marital distress. She had declined antidepressant medication because she was nursing Kira, but she did comply with regular counseling sessions over that time period. Ms. Parker noted that Kim had become depressed during pregnancy with Kira and the depression deepened after her birth. She noted that Kim was in a poor marriage, that she had moved away from friends and family in Georgia and that she was just beginning to recognize what different backgrounds she and her husband came from. She felt overcriticized by her husband.

RECOMMENDATIONS: The results of this evaluation strongly oppose the workability of a Joint Parenting Agreement. Although each parent appears to be fit and competent to independently care for the needs of Kira, it is painfully clear that there are major parenting differences between them. These differences include central concerns such as basic medical care practices, the importance of raising Kira in a single and consistent religious tradition, and even the type of neighborhood in which to raise Kira. Additionally, there is a very long history of poor communication and high levels of conflict of almost every conceivable manner, and I can find very little evidence of open or easy dialogue between them about even the most basic issues of Kira's well-being (for example, illnesses or injuries).

Chris' personality is such that he is very watchful and questioning about even minor concerns, and Kim interprets this as intrusive and critical of her. She responds to Chris by withdrawing further from him and his inquiries, and this in turn causes Chris to become more intent on

"getting answers". This is a cycle that has repeated itself all too often since the birth of Kira.

There is no evidence in this evaluation of physical violence between the parents or any risk of physical or psychological abuse of Kira. I agree with Dr. Hynan's assessment of this issue, and assessment in which he essentially noted that the December 2002 incident in which Kim hit Chris with a shirt does not rise to the level of physical threat and, in any event, there is no pattern of physical assaults by either of them.

It is my opinion that the father is the preferred custodial parent for Kira. Essentially, I agree with Dr. Hynan that the father is more likely to communicate openly with the mother about Kira's needs, more likely to be open and encouraging of the relationship with Kira, and more likely to follow routine and conventional medical/dental advice. Further, of the two parents it appears clear from interview and psychological testing that the mother has significantly more psychological problems and difficulties in her relationships with the father. Chris tends to be open, articulate and very responsible in his parenting. Kim tends to be somewhat more closed in her interactions, defensive and more self-focused. It is also apparent that she holds somewhat unusual, perhaps eccentric, beliefs about appropriate medical care for Kira, even given her background in public health nursing.

With regard to visitation, I would recommend a regular and unrestricted schedule of visitation between Kira and her mother. Both parents have suggested that an appropriate visitation schedule would include alternate weekends, one overnight during the week and alternating holidays throughout the year. I would agree with this plan

to the extent that it should go into effect after Kira reaches 3 years of age. Until that time, I would recommend less extensive visitation time away from her primary residence with her father, probably on alternate weekends from Saturday mornings until Sunday evenings and two brief visits during the week (ideally for up to four hours each time). I would further advise against any extended vacation visitation away from Kira's primary residence for more than four days at a time until Kira reaches 4 years of age. Thereafter, I would recommend restricted extended vacation visitations away from her primary residence to no more than 7 days at a time.

/s/ Roger P. Hatcher, Ph.D.
Roger P. Hatcher, Ph.D.
Clinical Psychologist
and
Registered Custody Evaluator (RCE)

RPH/ttl

APPENDIX L

Report to the court
Re: Kimberly Woodson, Custody dispute

I was asked to consult on a case regarding Kimberly Woodson who is petitioning for custody of the minor child, Kira Gambla. In preparation for this report, the following information was used:

- Clinical interview for 1 ½ hour with Kimberly Woodson
- Custody evaluation – Dr. Daniel Hynan
- Custody evaluation – Dr. Roger Hatcher
- Test data from evaluation for Dr. Hynan
- Test data from evaluation for Dr. Hatcher

Reason for Consultation

My services were recommended by Ms. Rose Stewart, a counselor at the DuPage YWCA as she felt that I would be able to evaluate the custody evaluation reports from a culturally sensitive perspective. It is from this perspective that I am writing this brief to be included in the court proceedings. I have not met with Mr. Gambla, and therefore cannot comment on his parenting skills. However, there are three critical issues that need to be addressed and considered in the evaluation of Ms. Gambla and her ability to promote optimal child development for Kira.

Behavioral Observations

I met with Ms. Woodson for 1 hour and 30 minutes as a clinical consultant to discuss her custody evaluation process. She appeared anxious during the consultation,

but became noticeably relaxed as we continued talking. The initial anxiety was not a reflection of the personality type, but a reflection of her concerns over losing custody of her daughter. She was dressed appropriately, and well groomed.

Ms. Woodson was very open and responsive to questions posed with to her, and it was easy to establish rapport with her. We discussed her background and history, the courtship and marriage to Mr. Gambla, her relationship with her children, and her career goals. Included in the discussion were cultural concerns and factors, including the importance of extended family and social support, emotional expression, and gender equity. Ms. Woodson had little difficulty disclosing personal information, and often expressed surprise that the information elicited was not included in the custody evaluation. She was verbally fluent, has an appropriate vocabulary. Her mood and effect [sic] were congruent. Ms. Woodson seems to have good insight and judgment.

Concerns

There are three general concerns from the custody evaluations that were conducted: cultural concerns, test results, and optimal child development. Again, it is critical that Ms. Woodson's evaluation be considered in light of her cultural background, particularly race, gender, and social class.

1. Issues concerning African American women

African Americans traditionally are defined by nine cultural variables: communalism (connectedness), harmony, spirituality, verve (spontaneity of expression),

movement, oral tradition, social time perspective, and expressive individualism (Boykin, 1987). A thorough discussion of these values is beyond the scope of this report. However, there are several variables that are important for consideration. First is the importance of social connections. African Americans have what is termed "fictive kinship" networks, which includes extended family, family friends, and members of the community. In the consultation, Ms. Woodson indicated that she is extremely close to her family, and that the relocation to the Chicagoland area served as a significant loss of social support for her. The fact that she is willing to remain in the area indicates her level of commitment to parenting and her willingness and ability to co-parent. The second important values are verve and movement. These variables combined point to a comfort with spontaneity and freedom of expression, which can be interpreted by the majority culture as impulsive or at times reckless. This is a concern that needs to be taken into account when examining her scores on the MMPI-2 (see below).

African American women face unique interaction of racism and sexism, and they face stereotypes based on the historical legacy of slavery. Images of African American women differ from White women and they are seen as dominant, aggressive, sexually promiscuous, rebellious, rude, and loud. There are many consequences of these images. First, expressions of anger in African American women is [sic] often perceived as more intense or threatening than they really are. Many African American women cope with this by attempting to repress anger, or exploding in rages. The frustration that Ms. Woodson experiences is often expressed in this manner, with attempts for her to repress her feelings.

These issues are important for the evaluation. The report by Dr. Hatcher suggests that Mr. Gambla would be more direct in communicating about the child. This statement does not take into account the cultural variables that differ between them, specifically race and gender. There is an inherent power difference between Mr. Gambla and Ms. Woodson; he is a white male, with a certain level of privilege, and she is an African American female, who is often overlooked due to racism and sexism. This power differential needs to be addressed in thinking about their communication patterns. In many ways, Ms. Woodson has no voice in the relationship. Her opinions have been challenged and questioned, even when she has provided documentation or support for her arguments. There is no real data in the assessment that indicates that Ms. Woodson would be ineffective in communication, and this issue should not be a part of the custody consideration.

2. MMPI-2 Results

The results for Ms. Woodson need to evaluated within cultural differences, as research suggests that African Americans and other ethnic minorities score differently and have various elevations related to cultural factors and coping styles (Dalhstrom [sic], Lachar, & Dahlstrom, 1986; Reed, Walker, Williams, McLeod, & Jones, 1996). Research on MMPI-2 and ethnic minorities is still being conducted, and psychologists have been cautioned in making interpretations based on norms that have not been adequately examined.

The report from Dr. Hynan indicated that Ms. Woodson had answered questions in a somewhat defensive manner,

"similar to those who have limited insight about themselves". This elevation did not invalidate the results of the scale. In my interaction with Ms. Woodson, she seemed to have adequate insight, and the capacity for self-reflection.

There is also an elevation on the scale that represents impulsiveness, difficulties with authority, and limited frustration tolerance. It is important to assess the relations on the supplementary scales based on contextual and situational factors. Ms. W. has an elevation on an antisocial behavioral scale, suggesting impulsive behaviors, difficulty with authority figures, three separate but related aspects. Careful consideration should be given to the items that reflect relationships with authority. Considering that Ms. W. was undergoing a custody dispute, discomfort with authority figures or individuals would be expected. It may be that the elevation in this score is a result of questions related to authority figures. The scale should also be considered in light of the stress from the divorce situation of living in the same household, being financially dependent on Mr. Gambla, and not having adequate social support. The stress that she felt may be related to the tendency for low frustration tolerance, as she may not have had sufficient resources to deal with the stressors. Stress studies suggest that becoming a parent and divorce produce high levels of stress.

The final concern raised in the evaluations is her use of repression and avoidance as a coping mechanism. Research suggests avoidance is a typical coping mechanism for African American women (Utsey, 1996). Repression is an adaptive coping mechanism from slavery, and the result of racism and sexism. The amount of stressors many African American women experience can be overwhelming, and cripple functioning. Many women repress feelings,

distract from issues, or engage in diverting activities. Ms. Woodson's score in this area would not be atypical for her peer comparison group, and actually may serve as an adaptive coping strategy.

It should be noted that there were no significant elevations on the clinical scales, including depression anxiety. Elevations on clinical scales would be more likely to have a significant relationship with parenting skills or family processes.

3. Child development

The center of this custody dispute should not only revolve around the abilities of the parents, but the best interest of the child, and her optimal development.

a. Racial identity

The court should take into account the biracial status of the minor child, Kira, and her optimal development, specifically her self-concept and self-esteem. Kira is both White and African American. Less attention needs to be paid to the socialization of her white racial identity. The mainstream culture reflects White middle-class values, and she will be socialized in this area through her interactions with Whites, the media, and the school system. It is vitally important that she also be socialized in the African American culture. Even if she were to be raised in a predominantly White or Latino neighborhood, her physical appearance will always set her apart as different. This is [sic] will have a significant influence on her self-concept and interpersonal relationships. It is so critical that African American and biracial children be raised in a household that reflects their culture that the Association

of Black Psychologists issued a position paper denouncing transracial adoption for children.

The development of identity is complex, but more so for multiracial individuals. Kerwin and Ponterroto (1995) developed a model of identity development for multiracial individuals based on research. The first stage, preschool, includes low salience to racial heritage as a component of the self. Children in this stage are aware of physical differences in parents. The second stage, entry to school age, occurs as individuals feel compelled to select a racial group for membership. Children in school age are often asked to identify their heritage, and select a response usually based on parental messages. Preadolescence and adolescence are characterized by the growing awareness of the social connotations of race, and usually triggered by specific environmental circumstances. The fourth stage in the model occurs in college and young adulthood, as individuals continue with immersion in one culture due to rejection of another. Adulthood, the final stage, is characterized by the continuing integration of identity, and an appreciation of a variety of cultural groups. The model clearly suggests that individuals struggle to integrate both identities across their lifespan. Again, it has to be stressed that children must be exposed to and socialized in both cultures in order to successfully integrate both heritages. Ms. Woodson is the best candidate to be able to help her daughter to embrace her African American heritage.

In the report, it is stated that Mr. Gambla has indicated that he will be sensitive to the cultural development of Kira, and that he lives in a neighborhood that also has Latino individuals. Simply living in [sic] near Latinos is not an appropriate solution for the development of cultural identity and self-concept for Kira for several reasons.

First, there are significant differences in the cultural values, behaviors, and lifestyle of Latinos and African Americans. Second, Kira will face unique challenges [as] a biracial individual, and substituting Latino culture may confuse her. Third, the assumption is that the Latino population will be accepting and embracing of her. This is often not the case, as biracial children report feeling rejected by other cultural groups.

b. Medical concerns

Finally, issues, have been raised about Ms. Woodson's perspectives on traditional medicine. First, alternative medicines are more widely accepted than is suggested in the evaluations. There is a growing movement against immunizations, and introducing chemical and synthetic materials to children through diets. It is also argued that Ms. Woodson was not attentive to the needs of her son, Che, when it was recommended that he receive treatment for ADHD. African American boys are overdiagnosed with ADHD, and African American psychologists recommend that children, especially boys, be not placed on Ritalin or other stimulants for treatment. African American boys seem to be hyper or impulsive, but this behavior is part of the cultural norm of movement. African American professionals would support her behaviors around his treatment. Finally, it is argued that Ms. Woodson may not seek treatment for her children. However, she has actively sought psychological services for herself to cope with the divorce. There is no concrete evidence that she would not seek help for her children. Rather this issue seems to be one of disagreement with Mr. Gambla around their perspectives of what is best for the children.

c. Spirituality

The evaluations suggest that Kira may struggle if raised in two different religious faith practices. Actually, research suggests that children raised in interfaith relationships or who are exposed to multiple religious faith practices actually have a better sense of their own spirituality. They use differing beliefs to challenge and support their beliefs.

Conclusion

It is my opinion that the custody evaluations conducted by Drs. Hynan and Hatcher provide no concrete evidence to question Ms. Woodson's parenting skills or ability. I would recommend that the couple engage in mediation services to receive training in co-parenting to lead to shared or joint custody. The mediator or counselor should be one who is sensitive to cultural issues between the couple, including race and gender equity, and one who would be sensitive to biracial issues in the child.

Anita Thomas, Ph.D.
Licensed Clinical Psychologist

/s/ Anita Thomas, Ph.D.

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APPENDIX M

FORENSIC REPORT

I. *DATE OF REPORT:*

10/13/04

II. *IDENTIFYING INFORMATION:*

Case Name:	Christopher Gambla & Kimberly Woodson
Case Number:	03 D 1116 (DuPage County)
Judge Pending Before:	The Honorable Stanley Austin
Attorney For Chris Gambla:	James Hagler, Attorney at Law Fax No: (312) 807-4782
Attorney For Kim Woodson:	Barbara Ann Corrigan, Attorney at Law Fax No: (630) 665-1289
Reports Evaluated by:	Charles L. Alexander, Psy.D.

III. *REASON FOR REFERRAL:*

Ms. Woodson requested that this clinician review evaluation reports of Dr. Daniel Hynan and Dr. Roger Hatcher and offer an opinion regarding the reports.

IV. *Assessments:*

MMPI-2	11/2003 – Dr. Daniel Hynan
Adult Adolescent Parenting Inventory	11/2003 – Dr. Daniel Hynan
Clinical Interviews	04/2004 – Dr. Roger Hatcher
Millon Clinical Multiaxial Inventory-III	04/2004 – Dr. Roger Hatcher
Parent-Child Observation	04/2004 - Dr. Roger Hatcher
Clinical Interviews	04/2004 - Dr. Roger Hatcher

V. *SUMMARY OF FINDINGS:*

Upon review of the assessments conducted by Drs. Hynan and Hatcher and reported in Dr. Hatcher's June 14, 2004 report, several inconsistencies in analysis and reporting were noted. Excerpts from the aforementioned report are italicized below and are followed by refutations based upon a review of the raw data, research and clinical manuals.

Psychological test responses on the MMPI-2 administered in Dr. Hynan's offices in November 2003 showed a mild level of guardedness on the K-Scale, but overall produced a valid test result. On the Clinical Scales of the MMPI-2 there was a single and significant elevation of the 4-scale. Dr. Hynan commented that the test profile suggested a degree of behavioral impulsivity, difficulties with authority and problems with frustration tolerance. Indeed, this test profile is associated with significant characterological and self-control problems. Kim is likely seen by others as somewhat immature, narcissistic and egocentric.

Dr. Roger Hatcher 6/14/04

In the paragraph above the interpretation of the [sic] both the MMPI-2 Validity Scales and Clinical Scales were presented independent of social circumstance and social context. With reference to the "mild level of guardedness" it should be noted that defensiveness or "guardedness" is to be expected within a custody evaluation due to the parent's desire not to adversely impact how others perceive them (Freidman [sic] et al, 2001, Siegel & Langford, 1998 and Siegel, 1996). It is apparent that Dr. Hatcher is familiar with this tendency as he normalized the "defensiveness" as seen within "the context of a Court-Ordered Evaluation" in his interpretation of Mr. Gambla's profile. Similarly, in relation to the "elevation of the 4-scale" which is a measure of "personality characteristics of the amoral

and asocial subgroup of persons with psychopathic personality disorders" (Dahlstrom et al., 1972 and Friedman et al, 2001) both clinicians failed to consider and or mention the impact of social circumstance and social context. Instead, based upon the elevation of the scale, Dr. Hynan surmised, "*that the test profile suggested a degree of behavioral impulsivity, difficulties with authority and problems with frustration tolerance. Indeed, this test profile is associated with significant characterological and self-control problems*". However, the literature states the presence of a high Scale 4 elevation does not always indicate that an individual will manifest antisocial behaviors, especially if there is not a history of such actions (Morey & Smith, 1988). Further, the literature (Duckworth and Anderson, 1995 and Friedman et al., 2001) indicates "fighting something" as a cardinal feature of an elevated Scale 4. Researchers have suggested that the individual may be in conflict with his or parents, friends, **spouse, society** or school and that it is essential to examine the context in which the person is being assessed in order to better understand the significance of the Scale 4 elevation (Friedman et al., 2001). To this end it should be noted that Blacks tend to produce an elevated Scale 4 (Nichols & Nichols, 2003). Certainly given the history and present status of racial and power dynamics in this country it is reasonable to consider the impact of such within the context of a court ordered evaluation. This in concert with an unhappy and unfulfilling marriage could also provide a plausible explanation for the elevated Validity and Clinical Scales.

Test results on the MCMI-III administered in this office were well within normal limits on the modifying Indices Scales of the test, thus indicating that she responded to the test questions in a generally forthright and honest fashion. Similar to the MMPI-2 test results

there were no findings of significant psychiatric disorder, such as depression, anxiety, thought disorder or major mood disturbance. There was, however, a significant elevation of the Narcissistic Personality Scale of the test, indicating findings consistent with prior testing on the MMPI-2. Again, this is an individual who likely does not present with acute psychiatric distress, but rather has longstanding and maladaptive characterological problems.

Dr. Roger Hatcher, 6/14/04

In the same way that the MMPI-2 information was interpreted and presented, the MCMI-III results were provided without consideration or mention of social context or circumstance. Neither diagnostician presented any background data supporting the findings. However, each provided a clinical impression based upon the assessment results. In my conversations with Ms. Woodson she indicated that neither diagnostician interviewed friends, relatives or professional acquaintances. Rather, it is apparent that they correlated their findings with the reports of Mr. Gambla and his support network. Further the manual (Millon et al., 1997) suggests the elevation of three personality scales may at times reflect personality strengths as well as personality pathology. These scales are the Histrionic, Narcissistic, and Compulsive. Ms. Woodson produced an elevated *Narcissistic Personality Scale.* This clinician is not necessarily suggesting the presence of strengths but rather that the assumption of psychopathology is suspect. According to the manual (Millon et al., 1997) three factors should be considered when assessing the presence of strengths or psychopathology:

1. The higher the BR, the more likely it is to reflect personality pathology rather than strength.

2. The presence of significant Axis I pathology supports the presence of a personality disorder.

3. The presence of personality pathology can also be judged by the level of the three Severe Personality Pathology scales, considered below.

Beginning with the factor #1, Ms. Woodson produced as [sic] BR score of 83 on the Narcissistic Scale. According to the Manual (Millon et al., 1997) for the Axis II disorders, BR 75 may be viewed as indicating the presence of clinically significant personality traits. A BR 85 or above are [sic] likely to indicate pathology pervasive enough to be called a personality disorder. This finding indicates she may possess or display clinically significant personality traits. However, this alone is speculative and should be further corroborated with other information including the patient's verbal report, the therapist's impression of the client, reports from significant others, background information as well as the **context** of other information outside the inventory. From the reported [sic] dated 6/14/04 it cannot be determined with any certainty that any of the corroborating sources of information were accessed or subsequently considered.

With consideration to factor #2, based upon the results of the assessment, the report reads, *"There were no indications of personality pathology or major psychiatric disorder"*. Further, there are no significant elevations of any of the Clinical Syndrome Scales. Hence the repeated reference to *"Characterological"* problems appears inconsistent and misguided. As with factor #1 there is no corroborating information, aside from the claims of Mr. Gambla, provided to support the diagnostic impression given.

Regarding factor #3, again there are no significant elevations within the Severe Personality Pathology Scales. As with factors #1 & #2 there is no corroborating information, aside from the claims of Mr. Gambla, provided to support the diagnostic impression given.

Finally, as with the MMPI-2 evidence of defensiveness should be considered in the context of child custody court ordered evaluation. Per the manual (Millon et al., 1997), should one encounter an extremely low Disclosure or Debasement score or a high Desirability score, it would be perfectly legitimate to consider the findings a null result. Ms. Woodson produced an extremely low Debasement score.

> *On the MMPI-2 administered in Dr. Hynan's office in December 2003, Chris showed a mild level of defensiveness in his responses to the test questions. However, this is not unusual in the context of a Court-Ordered Evaluation and, in any event, did not invalidate the overall test result. On the Clinical Scales of the MMPI-2 there were no significant elevations which might indicate any particular area of psychiatric concern.*
>
> *Dr. Roger Hatcher, 6/14/04*

Dr. Hatcher's interpretation of Mr. Gambla's MMPI-2 in contrast to Ms. Woodson's is far more forgiving. The narrative begins with the consideration of context as a contributing factor to Mr. Gambla's "mild level of defensiveness". This is in stark contrast to the presentation of similar findings for Ms. Woodson in which her profile was pathologized whereas Mr. Gambla's profile was normalized. Further, and perhaps more significant was the omission of data on Validity Scales. Mr. Gambla produced elevated scores on the L & S Scales in addition to the K

Scale. As with Ms. Woodson consideration must be given to the context of the evaluation with regards to the defensiveness. However, there [are] other character issues to be considered besides defensiveness. Mr. Gambla's K elevation is in the High range which in addition to defensiveness, according to Friedman et al., (2001) is also characteristic of the following:

- Persons who have difficulty tolerating suggestions that they might have psychological problems.
- Persons who tend to be uncomfortable and rejecting of unconventional or nonconformist behavior and are often quite judgmental.
- Persons who are relatively insightless concerning their emotional effect on others.
- Persons who are rigidly managerial in their attempts to control their "world" as through disorganization would create a catastrophic unraveling of their life.
- Persons who feel uncomfortable with any uncontrollable surges of emotion that can arise in the process of psychotherapy and the exploration of past experiences.

As stated above it would be inappropriate to consider this elevation alone when contemplating a clinical impression. Thus, the elevations of the L & S Scales must also be addressed. According to Friedman et al., (2001) persons with an elevated L scale are characterized in the following manner:

- Persons who are unusually virtuous, culturally conservative, overly conscientious and above

moral reproach. –this too should be considered in context

- It may reflect a person who although being educationally sophisticated, is quite morally and psychologically constricted and judgmental.
- Educated individuals with high L scores lack insight and generally are psychologically naïve.

The S Scale is designed to assess "the presentation of self in a superlative manner", (Butcher and Han, 1995) elevations are characterized by the following. According to Friedman et al., (2001) this scale appears to measure mental health, contentment with life, and an ability to get along effectively with others. Although mentally healthy people will exhibit some of these attributes, it is unlikely that many will exhibit all of them to a high degree. Consequently, high scores (T > 65) suggest claims of superlative adjustment likely are exaggerated. It should be noted that this was the highest elevated score (T = 73) on the profile. With consideration to the other elevations this finding could reasonably suggest an exaggerated presentation of adjustment.

None of the aforementioned information related to Mr. Gambla's MMPI-2 was entered in the 6/14/04 report. This clinician finds this omission significant particularly in the context of Dr. Hatcher's diagnostic impression of Mr. Gambla, when he states, *"He does tend to be a rather carefully organized,* ***compulsive*** *individual who provided reams of written documentation during this evaluation and tended to scrutinize every response or comment of the examiner."* As stated above this clinician finds the omission of the aforementioned Validity Scales to be quite curious in light of the [sic] Dr. Hatcher's diagnostic impression of Mr.

Gambla. Subsequent to the review of the *"reams of written documentation"* this clinician had a similar diagnostic impression. Apparently, contrary to Dr. Hatcher, this clinician found the behavior to be consistent with the findings in the Validity Scales. Whereas it alone does not merit a diagnosis, the integration and reporting of the findings as they relate to the information outside of the inventory provide important insights pertaining to Mr. Gambla's cognitive and affective processes.

> *On the MCMI-III administered in this office, his test responses were again generally open and non-defensive, and he produced a valid test result. There were no indications of personality pathology or major psychiatric disorder on the MCMI-III. On the Personality Patterns Section of the test there was a significant elevation on the Compulsive Subscale, again suggesting that this is an individual who tends to be tightly controlled, somewhat obsessive in his response style and can be overly attentive to minor details. This may be a great benefit to many people in their chosen fields of endeavor, since Chris is unlikely to be "forgetful" or irresponsible in carrying out his assigned duties. However, when taken to extremes this may be quite irritating to other in their relationships with him, especially when he overresponds to relatively minor concerns. That being said, there is no evidence of recklessness or behavioral impulsivity, or any evidence that he is likely to act out physically when he is upset.*
>
> *Dr. Roger Hatcher, 6/14/04*

The findings reported in [the] 6/14/04 report regarding the MCMI-III further corroborate the assertion of this clinician that significant data was omitted. The combined characteristics of the elevated MMPI-2 Validity Scales correspond to the DSM-IV TR diagnostic

criteria of Obsessive-Compulsive Personality Disorder which are as follows:

1. is preoccupied with details, rules, lists, order, organization, or schedules to the extent that the major point of the activity is lost
2. shows perfectionism that interferes with tasks completion (e.g., is unable to complete a project because his or her own overly strict standards are not met)
3. is excessively devoted to work and productivity to the exclusion of leisure activities and friendships (not accounted for by obvious economic necessity)
4. is over conscientious, scrupulous, and inflexible about matters of morality, ethics, or values (not accounted for by cultural or religious identification)
5. is unable to discard worn-out or worthless objects even when they have no sentimental value
6. is reluctant to delegate tasks or to work with others unless they submit to exactly his or her way of doing things
7. adopts a miserly spending style toward both self and others; money is viewed as something to be hoarded for future catastrophes
8. show rigidity and stubbornness

MCMI-III data yielded an elevated Compulsive scale. According to the manual (Millon et al., 1997) this orientation coincides with the DSM-IV obsessive-compulsive personality disorder. Hence both personality assessments yielded data consistent with the diagnostic criteria of the aforementioned personality disorder; which is further corroborated by the diagnostic impression of Dr. Hatcher. Ironically, Dr. Hatcher not only failed to consider and integrate all

relevant material, he attempted to normalize at times or minimize at others the apparent characterological flaws there were manifest in the clinical data, personal presentation and the information collected outside [sic] from out side the inventory or assessment (reams of written documentation). For example in the reporting of the MCMI-III findings he stated *"This may a great benefit to many people in their chosen fields of endeavor, since Chris is unlikely to be "forgetful" or irresponsible in carrying out his assigned duties."* It is quite possible that in their assessment and presentation of the data, both Drs. Hynan and Hatcher were betrayed by their own relative biases. Evidence, rest in the fact that the report is replete with examples of normalizing and lauding Mr. Gambla's manifest personality characteristics while at the same time tending to pathologize Ms. Woodson. This is not only perceptible in the statements made by both Dr. Hynan and Dr. Hatcher, but also by the omission of critical clinical data in light of the clinician's stated impression of the assessment subject.

IV. *OPINION*

Whereas it is not within the scope of the current review of the aforementioned assessments, this clinician is unable to provide an opinion as to the appropriateness of one parent as opposed to the other as it relates to the custody of their child. However, this clinician is able to render the following opinion regarding the psychological assessments and resulting reports based upon the review of the aforementioned assessments and subsequent reports that the recommendation to award custody to Mr. Gambla based upon the findings of the aforementioned assessments and subsequent reports is suspect. This opinion is based upon the premise that upon review of the raw data, scale scores, the subsequent reports, the omission of pertinent clinical

data, the effort to pathologize Ms. Woodson in contrast to the effort to laud Mr. Gambla that the reports were biased in the favor of Mr. Gambla as were the subsequent recommendations.

/s/ Charles L. Alexander 10/13/04
Charles L. Alexander, Psy.D. Date
Licensed Clinical Psychologist

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APPENDIX N

[LOGO] DANIEL J. HYNAN, PH.D., R.C.E., D.A.B.F.E.
Clinical Psychologist

December 3, 2004

Transmitted via facsimile number (630) 682-6866
The Honorable Judge Austin

Transmitted via facsimile number (312) 807-4782
James Hagler

Transmitted via facsimile number (630) 665-1289
Lyle Haskin

Re: Case of Woodson v. Gambla, No. 03 D 1116

Dear Judge Austin and Counsels:

My rebuttal opinion regarding the reports of Drs. Alexander and Thomas follows. Thank you for your consideration.

Sincerely,

/s/ Daniel J. Hynan, Ph.D. (ccb)

Daniel J. Hynan, Ph.D.

Diplomate of the American Board of Forensic Examiners
Board Certified Forensic Examiner
Fellow of the Professional Academy of Custody Evaluators
Fellow of the American College of Forensic Examiners
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[Address Omitted In Printing]

[LOGO] **DANIEL J. HYNAN, PH.D., R.C.E., D.A.B.F.E.**
Clinical Psychologist

December 3, 2004

Rebuttal Opinion

Case of Gambla v. Woodson, No. 03 D 1116

Background

The current rebuttal opinion report is being submitted following the Order dated November 16, 2004. Previously, I conducted an evaluation regarding Kira Gambla that pertained to custody, visitation, and removal, and issued a report dated February 19, 2004. My recommendation was that Mr. Gambla have primary residential care and sole custody of Kira, and that Ms. Woodson not be allowed to remove the child from the state of Illinois.

Subsequently, Dr. Roger Hatcher reportedly conducted a 604.5 evaluation about this matter, and, according to information stated in a joint telephone conference with the attorneys, essentially made the same recommendation. After that, reviews were conducted by Drs. Anita Thomas and Charles Alexander. Both issued separate reports, which I have reviewed. I have never seen or read the report of Dr. Hatcher, though there are references to it in the reports of Drs. Alexander and Thomas.

It is worth noting that the reports of Drs. Thomas and Alexander do not state whether they had read my report of February 19, 2004. More specifically, Dr. Thomas indicates that my custody evaluation and the test data from that evaluation was used in preparation for her report, and she includes an accurate partial quote from my report. Dr. Alexander notes that Ms. Woodson asked him to review

my report, though in his "Summary of Findings" section, it appears he may have relied upon what Dr. Hatcher stated about my report, as opposed to having read it himself. Following information from both attorneys, copies of the psychological test data I collected in my evaluation were sent directly to Drs. Thomas and Alexander.

In addition, in custody and related evaluations, the legal standard is what is in the child's best interest. Also, I carried out this evaluation as the court's witness in the DuPage Evaluation Program. Consequently, my comments in the current document are in keeping with those principles.

My earlier report explicitly states that it is a summary. The cultural and racial issues (and somewhat related detail about testing) that are areas of focus in the reports of Drs. Alexander and Thomas are discussed at more length here because such issues were raised by those psychologists.

Report of Dr. Thomas

Dr. Thomas, as well as Dr. Alexander, point out that cultural factors need to be considered in this matter as Ms. Woodson is African American, and Mr. Gambla is Caucasian. I agree that such factors need to be considered, as well as other ones that primarily focus on what is in Kira's best interest.

Dr. Thomas points out that African Americans strongly value networks of extended family, friends and community members. I agree that it can be very positive for a child to grow up in such a healthy, supportive social network. However, Ms. Thomas does not comment that Mr. Gambla

also has close and very supportive contact with his family, and also participates in the larger community. There is no clear evidence that either the social network of Ms. Woodson or Mr. Gambla would be superior to one another.

Dr. Thomas also notes the importance of values of verve and movement. She describes verve as meaning spontaneity of expression. As described in my report, I do not have any concern about spontaneity or movement, as broadly defined, but I do have significant concerns about Ms. Woodson in terms of impulsive behavior that has manifested itself in part in physical altercations within romantic relationships. Clearly, it would be a logical and clinical error to dismiss impulsivity that may result in physical aggression as no more than a positive manifestation of spontaneity or movement.

It is not clear from my reading of Dr. Thomas' report whether she believes that Ms. Woodson tends to explode in rages, as a result of her repressing her feelings. It is also not entirely clear what Dr. Thomas means when she states "expressions of anger in African American women is often perceived as more intense or threatening than they really are." What is important in a custody evaluation is to closely examine possible physical aggression by any party regardless of gender, race, or other characteristic, and consider it as a relevant factor in the custody matter, as indicated in Section 602 of the Illinois Marriage and Dissolution of Marriage Act.

Dr. Thomas offers the opinion that Ms. Woodson has no voice in the relationship with Mr. Gambla, and notes that her opinions "have been challenged and questioned." Aside from the fact that, to the best of my knowledge, the mother and father have had very little in the way of direct

communication with one another, Ms. Woodson has had a voice in the relationship since the beginning of it. For example, during the course of the evaluation that I conducted, the parents had a time-sharing routine. Perhaps obviously, both continue to voice their preferences through their attorneys. Both parents have had their opinions challenged and questioned, at least implicitly, because such things happen in every evaluation.

Dr. Thomas also notes that the communication about the child between the parents has been raised as an issue, "and this issue should not be part of the custody consideration." However, that opinion is in direct contrast to Section 602 of the Illinois Marriage and Dissolution of Marriage Act, which states that the ability of the parents to facilitate a good relationship with the other parent needs to be considered. Section 602.1 states that, in joint custody considerations, the abilities of parents to cooperate effectively and consistently about parenting must be taken into account. The effective cooperation and facilitation of a positive relationship with the other parent inevitably rely in large part on communication.

In the second section of Dr. Thomas' report, she focuses on the results of the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). I agree with Dr. Thomas that cultural differences need to be considered in test interpretation. The fact that the testing occurred within the context of a custody evaluation also needs to be considered. However, her statement that "ethnic minorities score differently and have various elevations related to cultural factors and coping styles" does not accurately characterize the findings of considerable research on racial differences on the MMPI-2 and of its predecessor, the MMPI (because a significant majority of items are the same on the MMPI

and the MMPI-2, most authorities view research findings on the older instrument to be generally relevant for the MMPI-2).

In examining racial differences on the MMPI-2, it is important to look at the considerable body of research, and not just rely on just one or two sources. For example, Greene (1987, 2000) has reviewed over 60 MMPI and MMPI-2 studies that compare scores of African Americans with those of Caucasians. There are different findings in different specific studies. In some studies, on some scales, African Americans have higher scores, and on some Caucasians have higher scores. The differences that do exist tend to be small and not of clinical significance. Greene has concluded that there are no consistent differences on the MMPI-2 or its predecessor between the scores of African Americans and Caucasians. Hall et al., (1999) conducted a quantitative statistical analysis on 25 MMPI and MMPI-2 studies that compared African Americans and Caucasians. That statistical analysis indicated that the very small differences that exist between the races are not significant from either a clinical or statistical perspective.

Dr. Thomas notes, "Research on MMPI-2 and ethnic minorities is still being conducted, and psychologists have been cautioned in making interpretation based on norms that have not been adequately examined." However, as summarized above, there has been considerable research in this area, and the MMPI-2 manual (Butcher et al., 1989) includes separate average scores for African American and Caucasian men and women.

Dr. Thomas suggests that a reference source (Dahlstrom, Lachar, & Dahlstrom, 1986) reports African Americans

"have various elevations" on the MMPI. Although I do not have that book available, another published study (McNulty et al., 1997) states that Dahlstrom el [sic] at [sic], concluded "there was little support for bias against African Americans" on the MMPI.

There has also been research on the MMPI-2 regarding those undergoing custody evaluations (e.g., Bagby et al., 1999; Bathurst et al., 1997; Posthuma & Harper, 1998; Siegel, 1996; Siegel & Langford, 1998). The custody evaluation context is an important one to consider in the interpretation of such scores, though it should also be noted that these reports do not include separate data for different or minority groups.

The MMPI-2 that I conducted with Ms. Woodson showed an elevation on Scale 4 indicative of impulsiveness, limited frustration tolerance, and difficulties with authorities, as briefly summarized in the earlier evaluation report that I wrote. As I previously noted, the elevation she obtained was above that of the standard cut off point, and thus is above about the 94th percentile. Of the research reports that give scores for custody evaluation samples, the average Scale 4 score is well within the normal limits (Bagby et al., 1999; Bathurst et al., 1997), and thus is very different from the elevation manifested by Ms. Woodson. As noted above, the review of dozens of MMPI and MMPI-2 studies that examine racial differences do not reveal any significant difference on this scale between African American and Caucasian individuals. The average score on this score [sic] listed in the MMPI-2 manual for African American women is also well within normal limits and very different from the score manifested by Ms. Woodson. In other words, there is no reason to expect that Ms. Woodson would have an elevated score on this scale just because

she is going through a custody evaluation, or just because she is an African American woman. Dr. Thomas raises the issue of whether Ms. Woodson may have been experiencing considerable stress, and I have little doubt that both parents have been experiencing a high amount of stress. However, this particular scale does not primarily measure stress, and thus the presence the stress would not account for the significant amount of elevation.

Dr. Thomas also addresses the elevation on the supplementary scale that represents the use of repression as a psychological defense mechanism. As defined within the realm of mental health professionals, and as it applies to this particular scale, the term "repression" has nothing to do with slavery or racism. Repression is characteristically described as an unconscious psychological mechanism through which uncomfortable material is kept out of conscious awareness. It should be noted that I do not consider this elevation on the repression scale to be a significant factor in my findings and recommendations, however.

Toward the end of her second section, Dr. Thomas states that "there were no significant elevations on the clinical scales." However, as described above, she did obtain a significant elevation on Scale 4, as described above.

The third section of Dr. Thomas's report focuses on child development. In the first part of that section, she discusses racial identity issues. Dr. Thomas clearly emphasizes the importance of Kira being socialized "in the African American culture." In fact, Dr. Thomas states "Less attention needs to be played [sic] to be [sic] socialization of her white racial identity." Although not explicitly stated, Dr. Thomas appears to make an argument that every bi-racial child, if

his or her parents separate, should be raised by the African American parent no matter what the other circumstances. I know of no scientific evidence to back up such an assertion. In addition, I believe there is no sound conceptual basis to assume that Kira's self-esteem, identity, or other psychological characteristics will be more facilitated by being raised in an African American or Caucasian household.

The next section in the report of Dr. Thomas pertains to medical concerns. Although Dr. Thomas indicates that there is "a growing movement against immunizations" she offers no scientific basis for her assertion. In addition, medical epidemiologists have, in some cases, found risks in not having children immunized, in that there consequently can be a higher risk of serious illness in the non-immunized children, in some cases even leading to fatalities. Also, as described in my report, my concern regarding Ms. Woodson and her history of obtaining professional services for Che primarily focuses on her apparently not having informed the therapist, Mr. Shulman, that Che had manifested significant problems, including having voiced suicidal inclinations. Thus, Che, after he moved, did not appear to have the benefit of an adequate intensity of professional mental health services.

Dr. Thomas also addresses the issue of spirituality for Kira. She maintains that individuals who are exposed to multiple religions tend to have a better sense of their own spirituality than those who do not. However, I know of no scientific evidence to support such an assertion, and Dr. Thomas does not offer one.

In her conclusion, Dr. Thomas indicates that shared or joint custody would be an appropriate outcome of this case.

It is noteworthy that she does not consider, as described in my evaluation report, that both parents voiced a preference for sole custody. Also, her conclusion in this regard needs to be considered within the context of her not having conducted a custody evaluation, and apparently only having had direct contact with Ms. Woodson. Furthermore, she recommends mediation for the couple, but does not indicate awareness that they already had such services, which were unsuccessful in obtaining a resolution.

Report of Dr. Alexander

As noted above, it is not clear that Dr. Alexander read my report. He makes numerous references to Dr. Hatcher's report. On page 2 of his report, he lists a quote in italics, and attributes it to me, but I believe it is likely to be Dr. Hatcher's interpretation of the MMPI-2 data that I collected in my evaluation.

Dr. Alexander comments, on page 2, about the issue of defensiveness, and again on page 4, in which Dr. Hatcher reportedly interprets data from my testing as Mr. Gambla showing a "mild level of defensiveness." Research on the MMPI-2 in custody evaluations tend to show modest increases in the average scores on the two main scales that measure defensiveness. As described in my evaluation report, Ms. Woodson had an elevation above that typically seen in custody evaluation samples, on a scale that primarily measures a type of defensiveness that represents having limited insight about oneself (Strong et al., 1999). On the other of the main Validity scales which tends more to represent an active effort to present oneself in a positive light, her answers did not show evidence of defensiveness. The overall results, as described on page 5

of my evaluation report, was that she "answered questions in a somewhat defensiveness [sic] manner." In other words, even though she does not present as markedly more defensive than the average person who undergoes a custody evaluation, it is nonetheless reasonable to consider such defensiveness in the overall test interpretation. It is also worth noting that such defensiveness by Ms. Woodson does not play a major role in my interpretation of her MMPI-2 responses.

Dr. Alexander notes that the presence of a high Scale 4 elevation does not always indicate that an individual will manifest anti-social behaviors, and he is correct. There is no test score or other index of which I am aware that would be able to make completely accurate predictions about future behavior. However, it is important in such evaluations to look at the convergence of data from different sources. Not only does [sic] the MMPI-2 results for Ms. Woodson raise concern about impulsiveness, both she and Mr. Gambla indicate that she has gotten into physical altercations within intimate relationships. Such altercations are examples of impulsivity as seen in behavior. Impulsiveness can also be seen in an individual's thoughts and decision-making. In that regard, I believe Ms. Woodson has made decisions about her children that do not reflect very sound deliberation about serious matters. For example, I think she did not give adequate consideration to the possibility that she would create difficulties for Che by sending him away to live with family. I also believe that she did not give adequate deliberation to some of the health care decisions she had made about her son. Although Che obviously is not the focus of the current evaluation, her decision making about him can be used as

representative of her likely decision making in the future about Kira.

As noted above regarding the report of Dr. Thomas, the preponderance of research evidence across dozens of studies, carried out over a number of decades, indicates that there are no consistent differences of any clinical or statistical significance between African Americans and Caucasians on the MMPI-2 and its predecessor. Dr. Alexander quotes a reference (Nichols & Nichols, 2003; see his report for this specific reference) that reportedly states, "Blacks tended to produce an elevated Scale 4." Although I do not have that specific book available, if such a statement is made in it, there is ample evidence that such a quote does not accurately represent the accurate conclusion from considerable research on this matter. Dr. Alexander also suggests that an unhappy marriage could provide an explanation for the elevated scores by Ms. Woodson. However, as described above regarding the report of Dr. Thomas, research on individuals who have undergone custody evaluations do not show the type of Scale 4 elevation manifested by Ms. Woodson.

On page 4 of his report, Dr. Alexander quotes Dr. Hatcher has [sic] having reported that Mr. Gambla "showed a mild level of defensiveness in his responses" on the MMPI-2 that was administered in my office. Please note that my interpretation about this matter is much different. On both the main Validity scales, Mr. Gambla obtained scores at or above the standard cut off points, and thus one was above about the 93rd percentile and the other above about the 97th percentile. Such elevations lead to a conclusion that his answers on clinical items and scales were not valid, as I indicate on page 5 of my February 19, 2004 evaluation report.

According to the report of Dr. Alexander, Dr. Hatcher administered to the parties the Millon Clinical Multiaxial Inventory-III (MCMI-III). Dr. Alexander takes issue with Dr. Hatcher's interpretation of the MCMI-III findings. Although I do not agree with all of Dr. Alexander's conclusions about the MCMI-III scores, it is very clear that the MCMI-III has serious problems in terms of its overall scientific validity (Rogers et al., 1999). Also, on three of the Personality Disorder Scales, it manifests a bias against women such that it should not be used in child custody evaluations. To summarize that problem, three main factors are at work: the scoring system by which raw scores are translated into standard scores are different for men and women and do not correspond to scientific evidence about the gender prevalence of those disorders; on the Histrionic, Narcissistic, and Compulsive personality disordered scales, women in custody evaluations have elevations at higher rates than do men (McCann, 2000); and there are negative correlations between those scales and other well-validated measures of psychopathology (Hynan, 2004). Thus, the MCMI-III results in this case should not be considered.

In addition, Dr. Alexander discusses possible interpretations of high MMPI-2 Validity scores, mostly in reference to Mr. Gambla. As I indicated before, his score elevations on Validity scales are such that his answers on clinical items and scales are considered invalid. However, it is noteworthy that such invalidity does not constitute evidence of psychopathology, and it is a stretch to try to extract much substantive clinical information just from the elevations on the Validity scales. In other words, it is possible for someone to have elevations on Validity scales and not have significant psychological problems. As I

indicated on page 11 of my evaluation report, Mr. Gambla presents with some obsessive features, but does not manifest an obsessive-compulsive personality disorder, or any other psychological disorder.

In the last page of his report, Dr. Alexander notes that he believes I have omitted critical clinical data. However, in the current document I point out that in the custody evaluation, I have considered relevant data about contextual factors, such as ethnic membership and being a client in a custody evaluation. Furthermore, I have integrated the test data with other sources from interviews, observations of parent-child interaction, and collateral informants. In contrast to Dr. Alexander's assertion, there is no bias of any type present in my evaluation, the report, or the recommendations.

Summary

After having had an opportunity to review the reports of Drs. Thomas and Alexander, I offer my respectful disagreement with their conclusions. Also, although I have not had an opportunity to read Dr. Hatcher's report, based on the information that has been presented about it, there are some aspects of it about which I disagree. Overall, my recommendation made in the February 19, 2004 report do [sic] not change at all after a review of these reports.

Sincerely,

/s/ Daniel J. Hynan, Ph.D. (ccb)

Daniel J. Hynan, Ph.D.

Diplomate of the American Board of Forensic Examiners
Board Certified Forensic Examiner
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National Register of Health Service Providers in Psychology
Certified Substance Abuse Provider

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Please see following pages for references

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APPENDIX O

[LOGO] *PSYCHCARE ASSOCIATES*

December 9, 2004

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Re: Marriage of Woodson

Case No.: 03 D 1123 [sic] (DuPage County)

Dear Attorneys:

Judge Stanley Austin recently ordered that I would provide a rebuttal opinion regarding reports by Dr. Charles Alexander and Dr. Anita Thomas regarding the above named matter. The rebuttal response is to be provided to your offices no later than December 15, 2004.

Dr. Thomas' report essentially opined that I did not properly consider the psychological test results in light of the parties being involved in a custody evaluation, corroborative information regarding personality traits measured on the tests, and the ethnicity of Kim Woodson. I disagree. I did, in fact, consider all of those factors in my deliberations and they helped form my opinion in the 604.5 custody report. I acknowledged that I could have written more extensively about these factors in the report, but

they are referred to and I did consider them. With regard to the report by Dr. Anita Thomas, she apparently is of the opinion that my report (or Dr. Hynan's report) should have specifically addressed the issues of Ms. Woodson's ethnicity as an African-American woman and "an inherent power difference between Mr. Gambla and Ms. Woodson". Dr. Thomas also suggested that psychological test results on the MMPI-2 should have accounted for the defensiveness of Ms. Woodson in a custody evaluation and the effects of the stress from the divorce on her test responses. She also suggested that some of the defensiveness noted on the test may be related to Ms. Woodson's ethnicity as an African-American woman and that, in fact, her test defensiveness "actually may serve as an adaptive coping strategy". Again, I would only comment that I did consider the effect of custody litigation and the stresses of the divorce on both parties taking the tests. There is published evidence that individuals in custody evaluations tend to show a slightly but significantly higher level of defensiveness on MMPI-2 testing. This, of course, makes sense when one considers the circumstance in which these people find themselves. As for Ms. Woodson's elevated four scale on the MMPI-2, it is my opinion that it was relatively mild and certainly did not rise to the level of sociopathic character disorder. However, from a clinical standpoint she did appear to have several of the traits of the 4-Scale elevation on the MMPI-2 when I interviewed her (and Dr. Hynan had noted this as well).

Dr. Thomas also makes certain comments about the importance of Kira's bi-racial background, and how "vidually important that she also be socialized in the African-American culture". This may indeed be true that Kira

needs to be aware of her biological and cultural background as she grows up, but this does not automatically implicate the mother as the only legitimate custodial parent. Other factors must be considered and I did so in my evaluation. Finally, Dr. Thomas made some comments about the issue of Ms. Woodson's medical decision making, both with regard to Kira's immunizations and with regard to treatment of her son's ADHD. Dr. Thomas pointed out that there as [sic] legitimate alternatives to conventional medicine and that "African-American boys are over diagnosed with ADHD". I did not disagree with these observations, but I did point out the Mr. Gambla is more likely to be medically attentive to Kira's well-being if he had custody. I also used these examples as a basis for my recommendation against joint parenting in this case, due to the extreme differences of opinion regarding medical matters between the parties.

Finally, I would point out that neither Dr. Alexander no [sic] Dr. Thomas had an opportunity to evaluate all of the parties in person, nor spend the amount of time that I spent in discussions with them. Based on my complete evaluation of the parties and the child, it was my opinion that Kira's best interest would be served in sole custody with her father. This is not to say that the mother is incompetent, neglectful or sociopathic.

This concludes my rebuttal.

Sincerely,

/s/ Roger P. Hatcher, Ph.D.
Roger P. Hatcher, Ph.D.
Clinical Psychologist

RPH/kp

cc: The Honorable Stanley Austin
18th Judicial Circuit Court
505 N. County Farm Road
Wheaton, IL 60187

TO BE RECOVERED

(2)

June 7, 2007

No. 06-1193

In The
Supreme Court of the United States

Christopher M. Gambla,

Petitioner

v.

Kimberly K. Woodson,
Respondent.

On Petition For A Writ Of Certiorari

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Illinois Appellate Court erred in holding that the racial and cultural heritage of a mother and father and their biracial child, Kira, was an appropriate factor to consider, among many other factors, when applying the "best interest of the child" standard to determine the proper custodial parent?

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STATEMENT OF THE CASE

This brief is filed in response to this Court's request for a response to the petition for a writ of certiorari. Because the decision of the Illinois Appellate Court does not conflict with this Court's decision in *Palmore v. Sidoti*, 466 U.S. 429 (1984), and because there is no split among the state courts of last resort as to whether the relative racial and cultural characteristics of a child and her parents may be considered as merely a factor among many in a custody determination, the petition should be denied.

On May 13, 2003, Christopher Gambla filed for divorce from Kimberly Woodson after one year of marriage. Ms. Woodson had one child from a previous marriage—a six-year-old son named Che Woodson. During their marriage, Gambla and Woodson together had another child, Kira Marie. Both parents sought sole custody of Kira during divorce proceedings.

At trial, two experts recommended that Gambla be awarded sole custody of Kira, at least in part on the basis that Kimberly had (at the time) petitioned for removal of Kira to her home state of North Carolina. That petition for removal was eventually withdrawn when Woodson determined instead to stay in Illinois to raise both of her children.

Family members also testified at trial. Gambla's mother, Arlene, testified that she helped care for Kira when her son was at work. She remarked that Kira would "often talk about" her mother when she (Arlene) and Kira were together. Kimberly's sister, Linda, testified that Kimberly breast-fed Kira, bathed her, prepared her for naps and bedtime, and further noted that she was "patient" with her daughter. As for Kira's half-brother, Che, Arlene noted: "Che and Kira have a good

relationship. Kira and Che are very glad when they get to see each other. Kira and Che like to play hide and seek . . . [and they] sing and dance together. . . . Kira always wants to be near Che and frequently asks for 'Che Che.'" *Gambla v. Woodson*, 367 Ill.App.3d at 455. A social worker who testified confirmed that "Che has a loving relationship with Kira." *Id.*

Gambla and Woodson both gave testimony as to the nature of their relationships with Kira and their relative fitness as parents. Gambla testified that his wife appeared to become depressed after Kira's birth and that she also had a different parenting style than he (particularly in the area of health care). While Gambla was a proponent of traditional medicine, Woodson, a licensed nurse, advocated an alternative medicine approach. According to Gambla, this differential resulted in clashes over, *inter alia*, decisions as to whether to feed Kira meat and give her fluorinated water.

Woodson agreed with Gambla that, after Kira's birth, she suffered from postpartum depression, and testified that she in fact sought counseling during that period of time. She also agreed that her approach to Kira's health care was different from that of Gambla, and complained that, as a result, Gambla would "frequently ma[ke] medical appointments for Kira at times that he knew [Woodson] would not be available" and further that he changed Kira's doctor without consulting her. *Gambla v. Woodson*, 367 Ill.App.3d at 451. As far as her own parenting style, Woodson "testified that she want[ed] Kira to be exposed to different cultures, languages, religions, and ways of thinking." *Id.* Woodson, who obtained a bachelor of arts degree in biology and African-American studies from Rutgers, further stated that she could "teach Kira a lot about African-American culture, including African-American expressions, the African-American way of moving, African-American

celebrations, and African-American family relationships." *Id.* To that end, according to Woodson, she took "Kira to [her African-American dance] class on occasion," where "Kira enjoy[ed] dancing with the women and children [in the] class." *Id.* Finally, Woodson testified that Kira "has a close relationship" with Che, that they play together, practice Tae Kwan Do together, and that Kira turns the pages for Che when he practices the trumpet. *Id.* at 452.

After hearing this and other testimony, the trial judge considered the various factors set forth under Illinois statute—namely, the wishes of the parents, the wishes of the child, the interrelationship of the child with her parents and siblings, the child's adjustment to home and school (if any), the mental and physical health of child and parents, the threat of physical violence or abuse (if any), and the willingness and ability of each party to facilitate and encourage a relationship between the child and the other party. The court noted, *inter alia*, that Kira appeared to love both of her parents and to be "happy spending time with each of them," and furthermore that Kira had a "loving relationship with her brother Che." Tr. Court order, Pet. Appendix p. 66a. As to the parents' differing parenting "outlooks," the court noted that "neither . . . approach [was] wrong." *Id.* As for the parties' willingness to encourage a relationship between Kira and the other parent, the court considered the expert testimony that Gambla appeared more apt to do so. However, finding that their conclusions were based largely on the pendency of a petition to remove Kira to North Carolina, the trial court determined that given the subsequent withdrawal of this petition, these conclusions carried less weight.

Concluding that both Gambla and Woodson were "loving, caring and able parents" who simply "c[ould]n't agree on what to do with their daughter," *id.*, the court

went on to consider an additional factor that had been raised by Woodson and noted by various experts—namely that Kira was a biracial child whose father was Caucasian and mother was African-American. As to this issue, after hearing Woodson's testimony as to her cultural and educational hopes for her daughter, that she would "provide Kira with a breadth of cultural knowledge and experiences that [Gambla] w[ould] not be able to do." Tr. Court order, Pet Appendix p. 69a. Additionally, the court noted, that both parties were "well intentioned when they say that they w[ould] attempt to expose Kira to all aspects of her ethnic heritage" but that "there are some obvious limitations imposed upon both." *Id.* Finally, the court determined to award custody to Woodson "based on her slightly better ability to provide for the emotional needs of the child which may be occasioned by her special circumstances . . .". *Id.*

On appeal, in a 2-1 decision, the Illinois Appellate Court affirmed the award of custody to Ms. Woodson. In so doing, the majority noted that Petitioner had conceded at oral argument that "race may be considered" in Illinois child custody decisions. 367 Ill.App.3d 441, 466, 853 N.E.2d 847, 868 The dissent, meanwhile, focused mainly on state-law evidentiary issues concerning the admissibility of weight attributed to certain expert witness testimony. The Illinois Supreme Court denied Petitioner's petition for leave to appeal on November 29, 2006.

On February 27, 2007, Gambla filed a petition for a writ of certiorari, and Ms. Woodson now responds.

REASONS FOR DENYING THE PETITION

I. THE ILLINOIS APPELLATE COURT DECISION DOES NOT CONFLICT WITH *PALMORE*

Petitioner first argues that this case warrants review because the Appellate Court's decision conflicts with this Court's opinion in *Palmore v. Sidoti*, 466 U.S. 429 (1984). However, *Palmore* presented starkly different facts than those at issue here and *Palmore*'s custody determination was based *solely* on race (rather than considering race among many other factors). Furthermore, the thrust of *Palmore* was to stamp out improper racial stereotyping that was simply not present here. Accordingly, the Illinois Appellate Court decision does not conflict with *Palmore* and *Palmore* provides no basis for a grant of certiorari.

Palmore involved a custody dispute between Caucasian parents of a Caucasian child. There, the father, who had originally been denied custody, sought modification of the prior judgment on the basis of changed circumstances—namely, that his ex-wife intended to marry an African-American man. Concluding merely on the basis of the races of the adults and child involved that this union would "subject[] [the child] to environmental pressures not of choice" (namely, that the white child would now be living with a black step-parent) the court removed the child from the mother's custody and place her with her father. *Palmore*, 466 U.S. at 431. In so doing, the court purported (again, solely on the basis of skin color) to be protecting the child from "the social stigmatization" that it reasoned "was sure to come." *Id.*

In its review, the Supreme Court noted that the trial court in *Palmore* had "made *no effort* to place its

holding on any ground other than [the] race" of the step-father and its perceived ill-effects on the child. *Id.* at 432. While the Supreme Court acknowledged that racist tendencies may persist, it concluded that "the reality of private biases and the possible injury they might inflict are [not] permissible considerations for removal of an infant child from the custody of its natural mother." *Id.* Thus, the *Palmore* court declared unconstitutional a state court's child custody decision based solely on race (when no other parenting factors are considered).

The nuanced decision of the trial judge in this case is distinguishable from the analysis in *Palmore* and, indeed, did not run afoul of its holding. Here, the trial court painstakingly considered each and every factor set out by the applicable Illinois statute—the child's interest in living with each parent, the parents' willingness to foster a relationship with the other parent, their child's relationship with her brother and other relatives, etc. Only after it weighed these statutory factors did the trial court proceed to consider Kira's racial and cultural needs as one additional step in its analysis.

The importance of the sequence of the trial court's analysis cannot be overstated: the court's measured approach reveals that racial or cultural considerations are a factor of *last resort* rather than first opportunity to be reached only after other statutory factors are deemed to be roughly equal. As a matter of pure probability, with eight statutory factors to consider, the likelihood of race coming into play repeatedly (at least as the Illinois court considered it here) appears small. Certainly, the court's reasoned approach takes this case well outside the realm of any *Palmore* problems—for the *Palmore* rule was that race (and, more to the point, the perceived potential for racial discrimination on the basis of a custodial parent's subsequent biracial marriage) failed strict scrutiny where it was the *sole* factor driving the custody decision.

Nor is this case a particularly good vehicle for deciding the role of race in custody cases. As the Appellate Court observed, Petitioner conceded at trial that "race may be considered." . 367 Ill.App.3d 441, 466, 853 N.E.2d 847, 868. And if race may be considered, then it may on occasion be the tipping point and that is all that this case is about.

Palmore is further distinguishable insofar as base racial stereotyping—namely, that any Caucasian child who lives with a Caucasian mother and African-American stepfather will suffer resulting "social stigmatization"—was permitted to control the custody decision. The logic applied by the trial court in *Palmore* was essentially as follows: (1) the child is white; (2) the child's (white) mother is marrying a black man; (3) the child is thus likely to suffer some hardship on account of racial prejudice; (4) therefore, it is in her best interest to be removed to her father. Nowhere in the *Palmore* decision is there any mention of any personal testimony as to *actual* discrimination experienced by the child or her parents. *Cf. Holt v. Chenault*, 722 S.W.2d 897 (Ky. 1987) (noting that, while the fact of an interracial marriage may not be considered to support a child custody modification, a child's reactions to and rebellion against such a circumstance is a proper factor for consideration). By all accounts, the trial court's decision represented mere conjecture based solely on the color of the new step-father's skin. As the Court noted in *Palmore*, such a classification "is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category." *Id.*

In complete contrast, the trial judge in this case made his custody decision based on detailed portraits of each parent created over the course of a 15-day trial establishing the parents' relative fitness—in all areas including racial and cultural concerns. The record

contained the observations and opinions of Dr. Anita Thomas, a psychologist specializing in multicultural counseling and family therapy. 367 Ill.App.3d at 452. She prepared a dissertation on the racial socialization of African-American families and a thesis on the emotional reactions of children in step families. She taught numerous classes on subjects including multicultural counseling, child development, human development, and professional identity. *Id.* Dr. Thomas opined that Kira would obtain a better sense of her racial identity from living with Ms. Woodson and that it was vitally important that Kira be socialized in the African-American culture. 367 Ill.App.3d at 454 and 462.

While the court obviously considered racial and cultural factors when concluding that Respondent would "be able . . . to provide Kira with a breadth of cultural knowledge and experience" that Petitioner would not, and that Petitioner was better suited to address the "emotional needs . . . which may be occasioned" by her biracial status, he did not merely assume as much based on the color of Respondent's skin. Instead, and in important contrast to *Palmore*, Respondent's "person" dictated the ultimate determination of the trial judge, as he was able to rely on the testimony of Respondent herself to determine her relative fitness to help shape Kira's cultural identity. Indeed, Respondent testified extensively on this point, noting, among other things, that she hoped to "teach Kira a lot about African-American culture, including African-American expressions, the African-American way of moving, African-American celebrations, and African-American family relationships," *Id.* at 468. The record further reflected that Respondent, an African-American studies major in college, also took Kira to cultural activities including an African-American dance class.

The lower court in this case considered racial and cultural factors among many others—and even then, as a

last resort—and furthermore considered the racial dimension in light of *actual* personal traits of the two parents (the "person" rather than the race). The state court's decision—which, as a state appellate court opinion, in any event has limited reach—is thus distinguishable from *Palmore* in a number of respects, and is not in conflict with existing Supreme Court precedent. For all of these reasons, it does not warrant review by this Court.

II. THERE IS NO SPLIT AMONG THE STATE COURTS OF LAST RESORT ON THE ISSUE OF WHETHER THE RACIAL AND CULTURAL BACKGROUNDS OF THE NATURAL PARENTS AND THEIR CHILD MAY BE CONSIDERED AS ONE FACTOR AMONG MANY IN RENDERING A "BEST INTERESTS OF THE CHILD" CUSTODY DETERMINATION

There is no split among the state courts of last resort on the question presented here—namely, whether in rendering a child custody decision a court may consider the racial and cultural backgrounds of the parents and child as one factor in its "best interest of the child" analysis. Petitioner points to an ostensible split between the Kentucky and Tennessee Supreme Courts, on the one hand, and the South Dakota and Nebraska Supreme Courts, on the other, as supporting his position that this case is worthy of this Court's review. In reality, however, these cases are not truly "split" but, rather, distinguishable for similar reasons that the instant case is distinguishable from *Palmore*.

Holt v. Chenault, 722 S.W.2d 897 (Ky.S.Ct. 1987) and *Parker v. Parker*, 986 S.W.2d 557 (Tn. S.Ct. 1999), the Kentucky and Tennessee Supreme Court cases

that Petitioner asserts "prohibit" any consideration of race in child custody determinations, are virtually indistinguishable from *Palmore* and thus constitute a direct application of that precedent. Similar to *Palmore*, in *Holt*, the non-custodial father sought to obtain custody based on a single changed circumstance—the mother's subsequent marriage to a man of a different race. The trial court granted the request for modification on two apparent bases: (1) the mother's interracial marriage; and (2) the child's resulting discontent and demonstrated attempts to run away on account of resulting teasing she had endured. The *Holt* court concluded that, while the child's reactions and behavior were appropriate to consider (even if they touched on matters of race), the "impact of [a] biracial marriage [wa]s an *inappropriate* basis for modification" of a child custody decree in light of *Palmore*. *Holt*, 722 S.W.2d at 899 (emphasis added). Accordingly, the court remanded for a determination of custody apart from general concerns about the interracial marriage (though the child's own reactions would be appropriate for consideration).

Parker similarly addressed whether the effects of an interracial relationship may be a basis for awarding custody. In *Parker*, the father sought custody of the child, in part, on the basis that his wife was in a relationship with an African-American man (there was testimony in the record that such relationships could be harmful to children). The trial court granted custody to the father, but stated that its holding was based on factors *other* than the racial element. On appeal, the *Parker* court "accepted the trial court's statement that race did not play a part in its decision-making in awarding custody to the father" and, accordingly, affirmed the custody grant to the father. Nonetheless, the court reiterated *Palmore*'s holding that "the alleged harmful effects of an interracial relationship on a minor child" would be an inappropriate basis for granting or denying custody.

Holt and *Parker* are merely clones of *Palmore*—direct applications of the *Palmore* rule that a parent's interracial marriage (or relationship) may not be considered as the basis for removing or denying custody of the child to that parent. And, while Petitioner cites *Jones v. Jones*, 542 N.W.2d 119 (S.D. S.Ct. 1996) and *Brown v. Brown*, 621 N.W.2d 70 (Ne. S.Ct. 2000) as arriving at contrary holdings, upon review, there is no true conflict, for these two cases are distinguishable from *Holt* and *Parker* both in fact and law (and, indeed, for many of the same reasons that the instant case is distinguishable from *Palmore*).

Similar to the instant case, *Jones* involved the dissolution of a biracial marriage—a Caucasian woman to a Native-American man. In granting the father primary physical custody of the children, the trial court considered, *inter alia*, the father's stated intention to expose his children to and educate his children in the ways of their Native-American heritage. Noting that the trial court's decision to grant the father custody was "not blind" to the issues of race, the South Dakota Supreme Court nonetheless affirmed, stating that it is "proper for a trial court, when determining the best interests of a child in the context of a custody dispute between parents, to consider the matter of race as it relates to a child's ethnic heritage and which parent is more prepared to expose the child to it." *Id.* at 123. The court then noted that it was "satisfied" that the court had not "*impermissibly* award[ed] custody on the basis of race." *Id.* (emphasis added).

Brown v. Brown is distinguishable from the cases of *Holt* and *Parker* inasmuch as *Brown* considered race in the context of the desirability of moving a minority child to a more diverse city (again, a non-*Palmore* context). In *Brown*, the mother argued that she should be allowed to remove her children from Lincoln, Nebraska, to New

York City, in part, because New York offers more racial diversity than Lincoln and her children were "minorities." When considering this issue *de novo* on appeal, the Supreme Court concluded that, while "a child's racial identity is one factor among several that may be considered in making custody determinations," *Brown*, 621 N.W.2d at 83, and the relative racial diversity of the minority child's proposed domicile was an "appropriate consideration," the evidence in the record did not support that it was a significant factor in this case. The Nebraska Supreme Court noted that there was no actual evidence that the children had in fact suffered any prejudice in Nebraska—nor that race relations were any better in New York. Accordingly, New York's racial diversity was not considered a factor that would improve the living conditions of the children in that case. In any event, while *Brown* clearly stands for the proposition that race (and its attendant factors—cultural considerations, diversity, etc.) may be considered as one factor in child custody determinations, it is similarly distinguishable from the *Palmore*-type cases and does not constitute a contrary authority.

CONCLUSION

The lower courts in this case did not decide the custody issue solely on the basis of race in violation of *Palmore*. Nor are the state courts of last resort split in answering the precise question presented here—namely, whether racial and cultural characteristics of the natural parents of a child (and their related willingness or ability to shape that child's racial identity) may be considered as one element of many in a child custody determination. Moreover, because the narrower question of whether race can be considered at all was conceded away by the Petitioner in the trial court below this Court should deny review of this case.

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(3)

No. 06-1193

FILED

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

CHRISTOPHER M. GAMBLA,

Petitioner,

v.

KIMBERLY K. WOODSON,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second District

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does a court's use of race as the basis for determining child custody violate the Equal Protection Clause of the Fourteenth Amendment?

2. Does a court's consideration of race as a factor in child custody determinations violate the Equal Protection Clause of the Fourteenth Amendment?

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STATEMENT OF THE CASE

This brief is filed in reply to the Respondent's brief in opposition.

The Petitioner stands on his Statement of the Case in the petition for writ of certiorari, and in reply to the Respondent's statements, provides the following additional information.

There is no dispute between the parties that the issue of race was raised by the Respondent in the Trial Court, that the child's and parents' race was considered by the Trial Court in determining custody, that prior to considering race as a factor in determining custody the parties were held equal or "roughly equal" by the Trial Court as to all other factors, and that the issue of race was the determinative factor, or "tipping point", in awarding custody.

The parties' dispute whether the Appellate Court opinion in this case conflicts with this Court's decision in *Palmore v. Sidoti*, 466 U.S. 429 (1984), and whether there is a split among the state courts of last resort in their interpretation of *Palmore*.

The Petitioner also disputes and clarifies the following.

1) The Respondent sets forth, "On May 13, 2003, Christopher Gambla filed for divorce from Kimberly Woodson after one year of marriage." Respondent's brief in opposition p. 4. In fact, each of the party's attorneys filed petitions for dissolution of marriage on their behalf, and Mr. Gambla's petition was filed *the day before* Ms.

Woodson's (R. C0001 and C0815). Ms. Woodson's petition was thereafter consolidated with Mr. Gambla's petition.

2) The Respondent sets forth, "Ms. Woodson had one child from a previous marriage - a six-year old son named Che Woodson." Respondent's brief in opposition p. 4. Ms. Woodson was never married to her son's father.

3) The Respondent sets forth, "As for Kira's half-brother, Che, Arl[i]ne noted:" Respondent's brief in opposition p. 4. The quotations attributed to that statement were made by Ms. Woodson's sister, Linda, and not Mr. Gambla's mother, Arline.

4) The Respondent sets forth, "At trial, two experts recommended that Gambla be awarded sole custody of Kira, at least in part on the basis that Kimberly had (at the time) petitioned for removal of Kira to her home state of North Carolina." Respondent's brief in opposition p. 4. This statement contradicts the evidence at trial. The Trial Court itself asked Dr. Hynan, "Dr. Hynan, would your opinion relative to custody be any different had removal not been an area that you looked into at the time that you did your evaluation?" Dr. Hynan answered, "It would not be any different." (R. C1541). Similarly, Mr. Gambla's attorney asked Dr. Hatcher, "Did your opinion rest in any part on the issue of removal?" Dr. Hatcher answered, "No. The issue had been settled." (R. C1743).

5) The Respondent sets forth, "However, finding that their [Drs. Hynan's and Hatcher's] conclusions were based largely on the pendency of a petition to remove Kira to North Carolina, the trial court determined that given the subsequent withdrawal of this petition, these conclusions carried less weight." Respondent's brief in opposition p. 6. The record clearly indicates that this

determination by the Trial Court was incorrect (see testimony in number 4 above). As stated by the Appellate Court dissent, "This testimony alone illustrates that the trial court's ultimate custody decision was mistaken, when reviewed under the clearly erroneous standard, because the court incorrectly weighed the testimony by incorrectly factoring nonexistent impeachment of the reasons for the doctors' custody opinions." Pet. Appendix p. 55a. Considering that the Trial Court determined that the case was exceedingly close and improperly discounted the doctors' opinions, it logically follows that a different result would have occurred. This is even more evident if race is an unconstitutional consideration.

6) The Respondent sets forth, "The court noted, *inter alia*, that Kira appeared to love both of her parents and to be 'happy spending time with each of them,' and furthermore that Kira had a 'loving relationship with her [step]brother Che.'" Respondent's brief in opposition p. 6. It is noteworthy that the Trial Court also found that Kira "has a loving appropriate, relationship with her cousins with whom she lives when she spends time with the Petitioner. In addition, there is no indication that she has anything other than a loving relationship with her grand parents, her aunts and uncles and all other family members with whom she comes in contact. In short, she is a loving child who loves her relatives in addition to her parents and who, by all accounts, is loved by each of them as well." Pet. Appendix p. 66a. In accordance with the Judgment of Dissolution of Marriage, and although Ms. Woodson was awarded sole custody of Kira, the parties continue to share her physical custody on a 50/50 basis until her enrollment in school.

7) The Respondent sets forth, "As the Appellate Court observed, Petitioner conceded *at trial* that 'race

may be considered.'" (emphasis added). Respondent's brief in opposition p. 10. The Respondent similarly sets forth, "the narrower question of whether race can be considered at all was conceded away by the Petitioner *in the trial court below*" (emphasis added). Respondent's brief in opposition p. 15. These are not factual statements. The Petitioner did not concede in the Trial Court that race may be considered. In fact, the Petitioner strenuously objected on no less than two occasions in the Trial Court to the introduction of race into the proceedings. Pet. pp. 5-7. The Petitioner conceded *during oral arguments at the Appellate Court* that Illinois case law allowed the consideration of race in child custody determinations so long as it was not the determinative factor in the decision ("race alone cannot outweigh all other considerations and be decisive of the question of custody"), *Fountaine v. Fountaine*, 9 Ill.App.2d 482, 133 N.E.2d 532 (1956); *Langin v. Langin*, 2 Ill.App.3d 544, 276 N.E.2d 822 (1971); and *Russell v. Russell*, 80 Ill.App.3d 41, 399 N.E.2d 212, 35 Ill.Dec. 378 (1979). Mr. Gambla went on, however, to argue based on *Palmore* that he disagreed with this state case law and any consideration of race by the courts in determining custody. Mr. Gambla made specific oral and written arguments at the Appellate Court to that effect.

REASONS FOR GRANTING THE WRIT

The Petitioner stands on his Reasons for Granting the Writ in the petition for writ of certiorari, and in reply to the Respondent's arguments, provides the following.

A. The Illinois Appellate Court Decision Conflicts With The Position Of The United States Solicitor General

The Respondent argues, "the court's measured approach reveals that racial or cultural considerations are a factor of *last resort* rather than first opportunity to be reached only after other statutory factors are deemed to be roughly equal. As a matter of pure probability, with eight statutory factors to consider, the likelihood of race coming into play repeatedly (at least as the Illinois court considered it here) appears small." Respondent's brief in opposition p. 9. The Respondent further argues, "And if race may be considered, then it may on occasion be the tipping point and that is all that this case is about." Respondent's brief in opposition p. 10.

In its amicus curiae brief for the petitioner in *Palmore v. Sidoti*, 466 U.S. 429 (1984), the United States Solicitor General would seem to disagree with the Respondent, and even predicted the scenario (as in the instant case) where race is necessarily converted into the decisive factor after the parties are held equal as to all other factors. That brief states,

> In addition to Florida, one other state allows consideration of a subsequent interracial marriage so long as race is not treated as the "controlling" factor in custody determinations. /6/ *Russell v. Russell*, 80 Ill.App.3d 41, 43, 399 N.E.2d 212, 215 (1979) (permissible for trial court to acknowledge potential social pressures attributable to interracial marriage so long as race alone is not the decisive factor);

> *Langin v. Langin*, 2 Ill.App.3d 544, 547, 276 N.E.2d 822, 824 (1971) (quoting *Fountaine v. Fountaine*, 9 Ill.App.2d 482, 486, 133 N.E.2d 532, 535 (1956)) ("'race alone cannot outweigh all other considerations and be decisive of the question (of custody)'"). /7/ It is our view that these decisions are erroneous. Once race is held to be a "relevant" consideration, it is virtually impossible to prevent it from becoming the "controlling" consideration in any particular case. If, for example, the natural parents are each found equally fit, then consideration [of race or] of one parent's subsequent interracial marriage necessarily will be converted into the decisive factor. Moreover, even if it could be confined to "relevant" rather than controlling status, considering race at all in the custody decision would be unconstitutional. As one court has recognized, "(t)he very act of considering race as a factor, and then disregarding it as a controlling factor, requires that the state admit contrary to the Constitution, that there are differences in human beings because of their color." *DeLander v. DeLander*, 37 U.S.L.W. 2139 (Cal. Super. Ct. Aug. 14, 1968). /8/ We therefore submit that race should be altogether stricken from consideration in change-of-custody proceedings. (emphasis added)

Therefore, the consideration of race in any manner in child custody determinations conflicts with this Court's

decision in *Palmore* and the position of the United States Solicitor General.

CONCLUSION

For the foregoing reasons, Mr. Gambla respectfully requests the Court to grant his petition for writ of certiorari.

Respectfully submitted,

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(4)

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PETITION FOR REHEARING

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GROUNDS FOR PETITION FOR REHEARING

In addition to the reasons previously provided for granting the writ of certiorari (given in the petition for writ of certiorari and reply to brief in opposition), the petitioner provides the following substantial grounds not previously presented.

A. The Treatment Of Race In Adoption Versus Custody Contexts Conflicts.

42 USC 1996b, Interethnic Adoption, states in part:

> (1) Prohibited conduct
>
> A person or government that is involved in adoption or foster care placements may not --
>
> (A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or
>
> (B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

Similarly, the State of Illinois, in 20 ILCS 505/7(e), states, "The Department in placing children in adoptive or foster care homes may not, in any policy or practice relating to the placement of children for adoption or foster care, discriminate

against any child or prospective adoptive or foster parent on the basis of race."

The Illinois Second District Appellate Court held in the instant case, however, that "race may be considered" in determining child custody "so long as race is not the sole consideration for custody decisions, but only one of several factors." *In re Marriage of Gambla and Woodson*, 853 N.E.2d 847 (Ill. App. Ct. 2d Dist. 2006).

Today in the State of Illinois, the act of discriminating on the basis of the race of an adoptive or foster parent or child is unlawful when placing children in adoptive or foster care. Yet, the act of discriminating on the basis of the race of a biological parent or child (where they each obviously share the same race, as in the instant case) is not necessarily unlawful when placing children for custody. Because of the federal statute that exists and the interpretations of *Palmore v. Sidoti*, 466 U.S. 429 (1984) by many states that allow the consideration of race in child custody determinations, this double standard - one for the adoption/foster care context and another for the child custody context - exists outside Illinois as well.

After all briefs were filed in the instant case, Attorney David D. Meyer lectured at the University of Florida in August 2007, on the role of race in decisions about the placement of children. The title of the lecture was "Palmore Comes Of Age: The

Place Of Race In The Placement Of Children." Appendix.

The lecture states, "Recently, new developments have only underscored the murkiness of the legal landscape" when it comes to the consideration of race in decisions about the placement of children.

> Indeed, the developments seem to point in opposite directions at once. On one hand, in the summer of 2006, an appellate court outside Chicago became the latest to read Palmore narrowly. So long as race is not the sole factor, the court ruled, state actors are free to take race into account with other factors in deciding with whom a child should live. Palmore had nothing to say, the Illinois court held, about a divorce court's decision to use race as a "tipping factor" in determining that a biracial child would be better off with her African-American mother than with her white father. In this view, the Constitution poses a barrier only to the most ham-handed uses of race in custody, leaving the state with broad discretion to weigh race flexibly alongside other considerations in determining a child's best interests.
>
> At the same time, however, the federal government has launched a new and aggressive campaign against race-matching in adoption. This campaign reads Palmore

> broadly to condemn virtually all race-conscious decisionmaking in the placement of children. In this view, even inquiring into a prospective adoptive parent's plans for dealing with the special challenges of a transracial placement is said to constitute race discrimination prohibited by federal statutes and, ultimately, the Constitution.
>
> Court decisions such as the one from Illinois would categorically open the door to free-wheeling considerations of race, while the new federal enforcement policy would slam the door shut except in the narrowest imaginable exceptions. Appendix 4a-5a.

The unresolved question, then, is, what role should race play in decisions about the placement of children?

> [A]s the Illinois court's recent decision in Gambla reflects, many observers continue to believe that race remains a relevant and often important factor in determining the custodial and familial associations of children. The Illinois court, like others before it, resolved the tension by allowing for race to be freely considered in placing children, so long as race is not given overtly dominant weight. That is progress, to be sure - it removes at least the most heavy-handed categorical uses of race as a qualifying characteristic for parenthood - but it plainly leaves the door open for wide

> reliance on racial preferences and stereotypes that are wholly unsupported and unsupportable.
>
> In stark contrast, the aggressive posture recently taken by HHS [(the Department of Health and Human Services)] in interpreting federal law effectively pushes race entirely from the field of relevant considerations. Its hostility to considerations of race is so strong that it would forbid not only preferences for same-race placements, but even inquiring into the preparedness of transracial adopters to protect their children against racial prejudice. Appendix 31a.

While the consideration of race in these contexts - adoption/foster care and child custody - have progressed, they have done so in opposite directions. The nature of the legal constraints on considerations of race in public decisions about children remains contested and unsettled. Appendix 30a. For this reason, the petitioner respectfully requests the Court to grant his petition for rehearing of the order denying his petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

No. 06-1193

CHRISTOPHER M. GAMBLA

Petitioner,

v.

KIMBERLY K. WOODSON,

Respondent.

As required by Supreme Court Rule 44.2, I certify that the petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2007.

Christopher M. Gambla

APPENDIX

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LENGTH: 12256 words

LECTURE: PALMORE COMES OF AGE: THE PLACE OF RACE IN THE PLACEMENT OF CHILDREN

NAME: David D. Meyer*

BIO: * Mildred Van Voorhis Jones Faculty Scholar and Professor of Law, University of Illinois College of Law. I am grateful to Professors Nancy Dowd and Barbara Bennett Woodhouse, directors of the University of Florida's Center on Children and Families, for the invitation to deliver this Weyrauch Distinguished Lecture in Family Law, and to Professor Walter Weyrauch for the example of his work.

TEXT:

I. Introduction

It is a great privilege to inaugurate this Lecture in honor of Walter Weyrauch. Professor Weyrauch's contributions to the fields of family law and comparative law are legendary. He has blazed multiple trails in legal scholarship, and a unifying

hallmark of his work is that he approaches every topic with imagination and an open mind, driven by a desire to understand how the law is actually lived. Professor Weyrauch's scholarship reminds us at every turn that the law is not to be found exclusively or even predominantly in law libraries and courthouses. Whether studying the legal traditions of the Romani people or how legal norms might govern outposts in space, Professor Weyrauch explores the complex ways in which law is interwoven with culture and occupies the interstices of human relationships, always paying close and respectful attention to the facts. n1 It is difficult to imagine a more useful model for the study of family law.

Among the many landmarks in his scholarship, Professor Weyrauch has written perceptively about race discrimination in this country and about the status of vulnerable groups more generally. n2 His work in this vein is partly the inspiration for my topic here-the role of race in decisions about the placement of children. A second inspiration is place, because Central Florida provided a particularly important legal landmark in this field: the Supreme Court's 1984 decision in Palmore v. Sidoti. n3

Race in the placement of children has been a flashpoint for decades. Given that the topic joins two of the most charged subjects in American society, race and child welfare, it could hardly be otherwise. n4 From one perspective, the child- welfare system callously ignores or discounts the costs of state intervention borne by African American and other

minority families. n5 From another, race is too often thrown out as an obstacle to doing what is best for children and for the broader society. n6 Observers often seem to agree that placement decisions are distorted by unfortunate "racial politics," even when they fundamentally disagree about the direction of the distortion. n7

In Palmore, the Supreme Court intervened pointedly to curb reliance on race. n8 Ruling in a divorce case out of Tampa, the Court held that the Equal Protection Clause did not permit a state court to transfer custody of a child based on her mother's decision to marry a man of a different race. n9

Palmore's intervention, however, plainly did not end the debate over whether race may be considered in matters of custody and adoption. n10 In the more than two decades since Palmore, courts, legislators, caseworkers, and adoption agencies have continued to struggle, often heatedly, to define the appropriate role for race in the placement of children. n11 Years after Palmore, states continued to adhere to statutes or other legal guidelines establishing priorities or preferences for same-race placements, sometimes specifying the length of time children would be kept waiting while caseworkers searched for willing adoptive parents of the child's race. n12 Even after Congress enacted legislation in the mid-1990s effectively extending Palmore's prohibition of race discrimination to the context of foster care and adoption, observers clashed over whether federal law

did not leave some wiggle room for "reasonable" considerations of race. n13

Recently, new developments have only underscored the murkiness of the legal landscape. Indeed, the developments seem to point in opposite directions at once. On one hand, in the summer of 2006, an appellate court outside Chicago became the latest to read Palmore narrowly. n14 So long as race is not the sole factor, the court ruled, state actors are free to take race into account with other factors in deciding with whom a child should live. n15 Palmore had nothing to say, the Illinois court held, about a divorce court's decision to use race as a "tipping factor" in determining that a biracial child would be better off with her African- American mother than with her white father. n16 In this view, the Constitution poses a barrier only to the most ham-handed uses of race in custody, leaving the state with broad discretion to weigh race flexibly alongside other considerations in determining a child's best interests.

At the same time, however, the federal government has launched a new and aggressive campaign against race-matching in adoption. n17 This campaign reads Palmore broadly to condemn virtually all race-conscious decisionmaking in the placement of children. n18 In this view, even inquiring into a prospective adoptive parent's plans for dealing with the special challenges of a transracial placement is said to constitute race

discrimination prohibited by federal statutes and, ultimately, the Constitution. n19

In this Lecture, I want to examine these contending understandings of the legal constraints on considering race in matters of child welfare and suggest that both are wrong. What both approaches share in common is a craving for a bright-line solution: Court decisions such as the one from Illinois would categorically open the door to free-wheeling considerations of race, while the new federal enforcement policy would slam the door shut except in the narrowest imaginable exceptions. My own view is that the Constitution does not provide such neat solutions. Strict scrutiny, properly understood, requires that any consideration of race must be justified by a persuasive demonstration that it yields very substantial benefits to children. I doubt that placement could often be denied on grounds of race under this standard, but neither do I believe that it mandates the unyielding color-blindness contemplated by federal officials and some scholars.

A frustrating feature of this understanding is that it would leave to case-by- case determination whether race could legitimately factor in to a placement decision. But this inefficiency is, in my view, an unavoidable result of the need to balance the Constitution's rightful skepticism of race-conscious decisionmaking by the government against the sometimes compelling needs of individual children.

I arrive at this conclusion in three steps. First, I describe briefly the key landmarks that frame the debate over race and child custody, including the Court's decision in Palmore and Congress's enactment and subsequent amendment of the Multiethnic Placement Act (MEPA) in the mid-1990s. n20 This will be familiar ground for many, but a brief orientation is necessary for what follows. Second, I turn to the recent judicial and administrative rulings, and contend that they either understate (in the case of the court opinions) or overstate (in the case of the administrative rulings) the constitutional and statutory constraints. Finally, I will close by suggesting what I see as the proper limits in this area.

I should emphasize the modesty of my project. I certainly do not claim to offer a comprehensive account of the enormously complex issues raised here, including the meaning of race, its significance to children, and the desirability or feasibility of aspiring to a "color-blind" society. All I can hope to accomplish in this brief space is to clear away some of the brush in recent arguments and to identify the relevant legal standards that should guide court decisions in this area. Given the confines of this platform, what follows necessarily appears in broad strokes. But I hope that it may suggest an analytical foundation upon which future arguments and empirical data might be organized.

II. History and Landmarks in the Battle Over Race and Custody

At the outset, it is worth recalling that laws regulating race in child placement were once an integral feature of Jim Crow. Statutes in Louisiana and Texas expressly prohibited adoption across racial lines. n21 And scholars have catalogued the extraordinary lengths to which state actors sometimes went to police the racial boundaries of family life in adoption and custody. In his book Interracial Intimacies, Randall Kennedy, for example, recounts the Kafkaesque story of Jacqueline Henley, a biracial child who could not be adopted by the African American foster parents who cared for and loved her, solely because she had been classified as "white" when she was born. n22

In other jurisdictions where no such laws existed, social norms achieved the same result. There are almost no recorded instances of formal transracial adoptions before World War II. n23 The practice remained no more than a trickle until the 1960s, when the integrationist ideals of the Civil Rights era spurred new interest. n24 The number of Black children adopted by white parents shot up from 733 nationwide in 1968 to 2,574 just three years later. n25

Then, the bottom fell out. One year later, in 1972, the National Association of Black Social Workers (NABSW) famously condemned the adoption of Black children by white families in incendiary terms,

describing it as a "form of genocide." n26 Child welfare agencies pulled back, and in two years the number of transracial adoptions had been cut in half. n27

A parallel debate was unfolding at the same time concerning the adoption of Native American children. Critics charged that child welfare authorities were tearing apart tribal communities and threatening their future by removing large numbers of Indian children and placing them into non-Indian homes. n28 Evidence in the early 1970s suggested that roughly a third of Indian children had been removed from their families and placed out through adoption or foster care. Overwhelmingly, these placements were in non-Indian homes. n29

In 1978, Congress acted to curb Indian adoptions through the Indian Child Welfare Act (ICWA). n30 ICWA requires deference in many cases to tribal courts. It directs that Indian children should be placed within the tribe, or with other Indian families whenever possible, and with non-Indians only as a last resort. n31 Many state child-welfare and adoption agencies embraced similar rules for transracial adoptions, sometimes requiring lengthy efforts to find a same- race placement before resorting to adoption across racial lines. n32

But just as race was looming ever larger as an obstacle to adoption, two important developments pushed back in the other direction. The first was the Supreme Court's 1984 decision in Palmore. Palmore

concerned custody after divorce, not adoption, but it had potentially broader implications. n33 Linda and Anthony Sidoti, both white, had divorced in 1980, and Linda had won custody of their three-year-old daughter, Melanie. n34 A year later, after Linda moved in with and planned to marry an African American man, Anthony sought a change of custody and the trial judge assented. n35 The judge explained that "there is no issue as to either [parent's] devotion to the child . . . or respectability of the new spouse," and insisted that "[t]he father's evident resentment of the mother's choice of a black partner [was itself] not sufficient to wrest custody from the mother." n36 But the judge reasoned that it would be in Melanie's "best interests" to avoid the "peer pressures" and "social stigmatization" sure to be visited upon an interracial household. n37

The Supreme Court, in a unanimous opinion by Chief Justice Burger, held that the trial court's custody order in Palmore violated the Equal Protection Clause. Because the state court's custody decision turned on a racial classification, it triggered the "most exacting scrutiny," requiring proof that the classification was necessary to the achievement of a compelling state interest. n38 Burger's opinion allowed that protecting a young child's welfare was a state "duty of the highest order," but then failed to follow up by asking whether the change of custody was in fact necessary, or narrowly tailored, to protect Melanie's welfare. n39 Instead, the Court's opinion turned on a dime, effectively implying that the inquiry was beside the point: "[W]hatever problems

racially mixed households may pose for children," the Court ruled, cannot sustain state action premised on racial prejudice n40 :

> The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. . . . [T]hey are not. . . . Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. n41

Palmore dealt only with a parental custody dispute. But its willingness to subject race-conscious custody decisions to strict scrutiny-and its condemnation of state efforts to shield children from racial prejudice by removing them from otherwise proper placements-cast a shadow over state preferences for same-race adoption as well. Any doubt on this score was removed by the enactment of the Multiethnic Placement Act (MEPA) in 1994. Even before MEPA, title VI of the Civil Rights Act of 1964 had broadly prohibited race discrimination in "any program or activity" n42 receiving federal funds-a statutory prohibition understood to be coextensive with the constitutional guarantee of equal protection. n43 MEPA was meant to give more specific content to this general guarantee by clarifying that any recipient of federal funds in the fields of foster care

or adoption may not "delay or deny the placement of a child" on grounds of race. n44

The original version of MEPA, passed in 1994, prohibited "delay[ing] or deny[ing] the placement" or "categorically deny[ing]" the chance to be a foster or adoptive parent "solely on the basis of . . . race." n45 The Act also expressly allowed agencies to "consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster . . . parents to meet the needs of a child." n46 The Act was significantly amended in 1996, stiffening the prohibition by dropping qualifying terms such as "categorically" and "solely," as well as the express allowance for evaluating race and cultural competence of prospective parents. As amended, the Act now prohibits, without qualification, "delay[ing] or deny[ing] the placement of a child . . . on the basis of race, color, or national origin." n47

MEPA thus opened doors to transracial adoption that had been at least partly closed since the 1970s. n48 MEPA's timing also coincided with the enactment of another important federal statute, the Adoption and Safe Families Act of 1997 (ASFA). n49 ASFA aimed to quicken the pace of adoptions generally by limiting states' obligations under pre-existing federal law to attempt family reunification before terminating the rights of abusive or neglectful parents. n50

The combined effect of MEPA and ASFA has been significant. The number of adoptions overall has

more than doubled since ASFA took effect, and in some states, it has tripled. n51 Furthermore, a greater share of these adoptions cross racial lines: in 1998, fourteen percent of Black children adopted from foster care were adopted by a family of a different race; in 2004, the number had climbed to twenty-six percent. n52 While resistance to transracial adoption has declined, it is clear that many child-welfare professionals continue to believe, as a federal Interagency Task Force on Adoption stated in 1988, that "[a]ll things being equal, it is preferable to place a child in a family of his own racial background." n53 What is far less clear, especially after the amendments tightening MEPA, is whether it is legal for adoption workers to act on that belief.

III. Recent Developments-Diverging Paths on the Relevance of Race

Two recent developments highlight the range of opinion on the permissibility of considering race in making placement decisions for children. One suggests a broad allowance for race-matching, while the other suggests almost none. There is reason to think that neither is quite right.

A. Barring Consideration of Race Only as the "Sole" Basis for a Custody Decision: In re Marriage of Gambla

The Illinois case, In re Marriage of Gambla, n54 involved the divorce of an interracial couple. Both

the husband, Christopher (who was white), and the wife, K berly (who was African American), sought sole cu dy of their only child, three-year-old Kira. Both of the experts in the case who had been qualified to offer opinions about Kira's best interests concluded that she would be better off with her father. n55 They based this judgment partly on observations of the parties' interactions, the mother's idiosyncratic views about conventional medical care, and some history of the mother obstructing the father's access to Kira. The trial court discounted the experts, however, and found both parents to be perfectly equal with respect to each "best interests" factor. n56 The deadlock was finally broken by considering race:

> The trial court noted that Kira would have to learn to exist as a biracial woman in a society that is sometimes hostile to such individuals and that Kimberly would be better able to provide for Kira's emotional needs in this respect. The trial court believed that this factor tipped the scale slightly in Kimberly's favor, and it awarded Kimberly sole custody of Kira. n57

Reviewing this decision, the Illinois Appellate Court found that this approach comported both with state law and the constitutional dictates of Palmore. The state court reasoned that, in Palmore, "the custody award was unconstitutional, not because the trial

court considered race, but because the trial court considered solely race." n58 The court concluded that "so long as race is not the sole consideration for custody decisions, but only one of several factors, it is not an unconstitutional consideration." n59 The court noted that this view was supported by "[v]olumes of cases from other jurisdictions" interpreting Palmore in the same way. n60 Under this reading of Palmore, the Illinois trial court's use of race was unproblematic because race was certainly not the only factor considered, it was just the only distinguishing factor.

This understanding of Palmore is almost certainly incorrect. As an initial matter, it is simply wrong to say that the Palmore trial court had considered only race. To the contrary, the court in Tampa had considered a series of allegations by the father about the mother's neglectful caregiving, n61 but implicitly rejected these claims, finding "no issue as to either party's devotion to the child." n62 The court then went on, as did the trial court in Gambla, to consider race, a consideration that ultimately carried the day. In neither case, then, was race the "sole consideration" relevant to custody.

Nor, in any event, is there much analytic substance to the distinction between using race as a "sole" factor and using it to "tip scales" that would otherwise be balanced differently. The distinction recalls the debate in the Supreme Court's affirmative action cases over the relative weight to be assigned to race in admissions decisions. In Regents of the

University of California v. Bakke, n63 Justice Powell valorized the use of race as a soft "plus" factor in a broader mix of diversity considerations, contrasting the overly rigid way in which the University of California-Davis medical program made race effectively the sole qualifying characteristic for its set-aside seats. n64 More recently, in the University of Michigan cases, the Court disparaged the undergraduate admissions program for rigidly quantifying the comparatively higher value it assigned to race as compared to other diversity factors. n65 It is important to remember, however, that the Court's evaluation was relevant to its determination of whether the racial classifications could be considered "narrowly tailored" to the compelling goal of diversity. By contrast, Gambla and similar cases have instead looked to the relative weighting of race to decide whether the classification should be subject to strict scrutiny in the first place.

Other courts have tried slightly different gambits to cabin or sidestep entirely the application of equal protection principles to race-based child-placement decisions. In an en banc decision in 1977, the former Fifth Circuit reasoned that race-matching should not be considered a suspect racial classification because race was considered only in "a nondiscriminatory fashion." n66 "Impact alone does not sustain a claim of racial discrimination," the court noted. n67 Rather, intent to discriminate must also be shown, and "[t]here has been no suggestion . . . that the defendants had any purposes other than to act in the best interests of the child when it considered race."

n68 This reasoning, however, conflates motivation and intent. The Supreme Court has now clearly held that all classifications intentionally drawn on the basis of race are subject to strict scrutiny, even if the motivations behind the classification are benign. n69

The former Fifth Circuit also sustained consideration of race in adoption by fitting it within broader policies to match adoptive parents and children according to all physical features, including eye color, hair color, facial features, and so on, on the "belief that a child and adoptive parents can best adjust to a normal family relationship if the child" n70 can pass as a genetic offspring. The court freely allowed that it did "not have the professional expertise to assess the wisdom of that type of inquiry," but deferred because the supposed benefit is plausible. n71

Here again, the court's reasoning begged the question. The court's deference would be appropriate if only the rational-basis test applied; but strict scrutiny cannot be avoided simply by packaging race alongside non-suspect classifications. Under strict scrutiny, a court must be convinced of the "wisdom" and demonstrated necessity of using suspect classifications; plausible conjecture is not enough. n72

Contrary to the artifices found in these cases, both old and new, all race- conscious government decisionmaking must be subjected to strict scrutiny. There is no basis for placing race-based decisions in the context of adoption and custody as somehow

outside the scope of heightened constitutional review.

B. The Move Toward Color-Blindness in Federal Enforcement Policy

While Gambla has sought to narrow Palmore almost to its facts, officials in the federal government lately have been seeking to push Palmore to its outer limits. Writing in 2003, Randall Kennedy forecast dim prospects for aggressive enforcement of federal civil rights law against adoption agencies. He observed that the U.S. Department of Health and Human Services (HHS), the agency charged with enforcing MEPA and related laws against race discrimination, was dominated by "well-entrenched officials . . . [who] were opposed to the law in the first place" and were unlikely to take any "aggressive steps" to enforce it. n73 Yet, even while Professor Kennedy's book was probably at press, officials in the HHS Office for Civil Rights were preparing a 60-page letter finding Hamilton County, Ohio, and the State of Ohio in violation of title VI and MEPA. n74 Although the agency had launched more than 130 investigations over the previous 5 years, this was the first time it had issued a formal letter finding a violation.

The enforcement letter marks an important turning point in the federal government's understanding of the legal strictures on race-matching. n75 The letter ruling, based on an investigation into adoptions in the Cincinnati area spanning more than four years,

catalogued a series of illegal practices, both in agency policies and in individual adoptive placements. It began with the case of two- year-old Leah Hahn (a pseudonym assigned by HHS). n76 Leah, who is African American, had been born with Fetal Alcohol Syndrome and a form of dwarfism. After she had been in the permanent custody of the county for about six months, a married couple, the Atkinsons, inquired about the possibility of adopting her.

The Atkinsons appeared in many respects to be an ideal placement. They had three biological children, each of whom had significant special health needs, and they were longtime foster parents to a fourth child, an Alaskan Native who, like Leah, had a form of dwarfism as well as other special needs. The Atkinsons learned about Leah from Little People of America, a national advocacy group in which the Atkinsons were active. There was, however, a potential catch: The Atkinsons were white and lived in North Pole, Alaska, a suburb of Fairbanks. n77

Caseworkers in Cincinnati responded cautiously to the Atkinsons' expression of interest. They wanted to know how many African Americans lived in Alaska and in the area where the Atkinsons lived. They asked about the racial composition of the Atkinsons' church and school system. Finally, some caseworkers were concerned about the Atkinsons' stated intention to raise Leah in "a color-blind manner"; one caseworker expressed the view that "there [is] no such thing as 'color blind.'" n78

The agency decided to wait on consideration of the *Atkinsons' application to see if* alternative placements might be found. n79 After several months, the agency matched Leah with an African American woman in Columbus, Ohio, who ultimately decided that she did not want to adopt a child with dwarfism. n80 Thereafter, Leah was adopted by a white woman in Cleveland. n81 Although the new mother was white, HHS found that race still drove the agency's decision. n82 It noted that "this placement was looked upon favorably by [the county agency] because [the woman's] neighborhood was integrated, and some of her family members were biracial." n83

HHS held that this consideration of race violated title VI, n84 the statutory ban on race discrimination that parallels the U.S. Constitution's guarantee of equal protection. n85 The agency had both delayed and ultimately denied the Atkinsons' application on grounds of race. n86 HHS did not base its finding only on the county's decision to defer its decision on the Atkinsons. It also held that the agency had no business inquiring about the racial diversity of the Atkinsons' community and social circles, or their plans for addressing Leah's racial identity. n87 As HHS saw it, the county's selective inquiry into community diversity and plans for addressing a child's racial heritage only in cases of transracial adoption showed that "different standards" applied depending on the race of the applicants. Such discrimination, HHS ruled, could not be justified by "generalized assumptions and stereotypes of parents

based on their race"-such as that African American parents are specially able to guide African American children in coping with racial prejudice. n88 Instead, under strict scrutiny, any inquiry relating to race must be supported by exceptional facts suggesting that a particular child has a peculiar and compelling need for a same-race placement. n89 Under this approach, for instance, it might be permissible to consider race in placing an older teenager who was adamant in resisting placement with white parents; but broader assumptions about the benefits to children of interacting with adults who share the child's racial background are impermissible. n90

In a separate Penalty Letter, HHS ultimately fined Ohio $ 1.8 million for its repeated transgressions. n91 In practical terms, the amount of this penalty may be as significant as the legal reasoning that underlies it. As Elizabeth Bartholet rightly points out, HHS's willingness to impose-for the first time-such a severe financial penalty "raises the stakes in a way that agency directors and agency workers will not be able to ignore." n92

HHS underscored its newly aggressive commitment to prohibiting race-matching in a second enforcement action against South Carolina in 2005. n93 As in the Ohio enforcement action, the Department found that the State's routine practice of subjecting "families who were willing to adopt transracially . . . to an extra layer of scrutiny to assess their ability to adopt transracially" violated both MEPA and title VI. n94 HHS opined that "assessing the race and ethnicity of

the parents' friends, the race and ethnicity of the members of the parents' church, the race and ethnicity of the parents' neighbors, and the racial and ethnic make-up of nearby schools," and generally "forc[ing] the prospective parent to defend their ability to nurture a child of a different race or ethnicity," was illegal. n95 So, too, was asking prospective transracial adoptive parents whether their extended families would welcome a child of a different race or whether their neighbors would react with hostility. n96 In short, "[a]n evaluation system which assesses a parent's ability to adopt transracially evaluates applicants differently on the basis of race, color or national origin, and thus violates Title VI." n97 The Department fined South Carolina $ 107,481. n98

IV. Toward a New Understanding of the Scrutiny Required of Race-Conscious Custody Decisions

HHS's rigid view of the legal strictures on race in child placement could not be more different from the almost-anything-goes attitude exemplified by the Illinois court's decision in Gambla. Whereas Gambla was prepared to validate almost any use of race as a factor in placement decisions, so long as it was not exclusive, HHS would permit almost none. Indeed, even assuming that transracial placements raise unique child-welfare issues appears to skirt the law, in the agency's view. HHS's hostility to race-matching is certainly more in keeping with the tenor of MEPA's evolution toward color-blindness in adoption and foster care, but in some respects may

go too far. The Department is right to subject race-based decisions to strict scrutiny. Title VI, after all, follows constitutional standards in scrutinizing race discrimination, and MEPA ties its standards to title VI. But there is reason to doubt that strict scrutiny so tightly limits government inquiry into race.

In one important respect, HHS's view of strict scrutiny is actually too loose. The Department-like the courts in Gambla n99 and similar cases, and like a good deal of the scholarship in this area-assumes that states have a "compelling interest" in ensuring the "best interests" of affected children. n100 The Supreme Court came close to stating the same view in Palmore, although it stopped just short: it described the "best interests" of children as a "substantial" government objective before going on to undercut that proposition by holding that "whatever" the impact on children, their custody may not be reassigned out of concerns for racial prejudice. n101

The difficulty with classifying a child's "best interests" as a compelling state interest, besides the fact that Supreme Court precedent seems to refute the idea, n102 is that the concept is simply too amorphous. n103 It could mean anything from shielding a child from life-threatening harm to simply giving a child a tiny, marginal advantage over available alternatives. To legitimately qualify as "compelling," any potential gain for children must be quantified as significant, not merely extant. n104

Because of the slipperiness of the "best interests" standard, some judges and scholars have concluded that the only child-welfare interest substantial enough to rank as "compelling" is preventing serious harm to a child. n105 But this may well be too narrow. Given the state's basic trust obligation to children and the way in which the state's own future is tied to the well-being and healthy development of the next generation, it seems plausible to understand the state's "compelling" interests as extending beyond merely sparing a child from injury to ensuring that children have the opportunity to flourish. This conclusion would be consistent with the decision in Troxel v. Granville, n106 which left the door open to state intervention to preserve children's important relationships with non- parents even in the absence of proof that they would otherwise be harmed. n107 If this is correct, then race-based decisionmaking in this context is permissible only if it can be demonstrated that taking race into account is needed to substantially benefit children.

Framing the legal question in this way has several implications. First, race may not be considered where it yields only marginal gains for child welfare. Under this view, the Illinois court was plainly wrong in Gambla to rely on race where it found that this consideration tipped the scales only "ever so slightly" in favor of the mother. n108 Benefits so small cannot justify the very real costs of entrenching race-conscious decisionmaking by the government. The U.S. Supreme Court has long emphasized that racial

classifications are costly for society because they "delay the time when race will become a truly irrelevant, or at least insignificant, factor." n109 In the context of custody decisions, they arguably impose distinctive costs as well on individual family members, erecting barriers between parents and children and effectively validating for children "racial designations which stem, at least in part, from a rigid historical system of racial identification." n110 Particularly given these costs, it is indeed difficult, as Twila Perry has written, to imagine a sufficiently strong justification for considering race in custody disputes between a child's parents. n111 In such cases, both parents presumably already have established a loving bond with their child motivating them to be sensitive to their child's needs, and both have demonstrated a willingness to overcome racial boundaries in their own relationship. Under these circumstances, resorting to general considerations of race in deciding custody seems quite unlikely to yield substantial benefits to the child.

Second, given the available empirical evidence about child well-being in transracial adoptions, it is highly doubtful that a broad use of race to decide custody issues could be sustained. Studies overwhelmingly show that children do very well raised in multiracial families. n112 Indeed, researchers have found that transracial placements are as stable and deeply attached as same-race placements, and that "transracial adoptees do as well on measures of psychological and social adjustment as black children

raised inracially in relatively similar socio-economic circumstances." n113 Interview data with adult transracial adoptees generally offer the same positive assessment. n114 Therefore, it will generally be difficult to demonstrate a "substantial benefit" to children from a same-race placement, particularly if the alternative would require a significantly longer wait in temporary foster or institutional care. n115

Yet, there are surely some individual cases where children might benefit substantially from taking race into account. Suppose, for example, that a transracial placement would place an African American child into an isolated, all-white community intensely hostile to African Americans, and that the white adoptive parents had given no serious thought to dealing with this dilemma. Without doubt, it could be shown that placing the child in a less hostile environment would substantially benefit her. Researchers studying child welfare in transracial placements have found that "[i]n particular, a community's racial dynamics can affect transracially adopted children's adjustment," and that "[t]hose making transracial placement decisions should thus consider community- and neighborhood-level influences." n116

Yet, here is where I think Palmore and the HHS interpretation go wrong. Palmore suggests that "whatever" the harm to children, a custody decision cannot "give effect" to prejudice. n117 For its part, HHS contends that even to inquire about the racial diversity and potential hostility of a transracial

placement imposes "different standards." But without inquiring, it is impossible to know if the child would substantially benefit from a different placement.

HHS faults Ohio for failing to subject same-race adoptive placements to the same scrutiny. A presumption that Black parents have special competence to help children grapple with the cruelties of racial prejudice, HHS argues, is nothing more than a stereotype. Yet, the Supreme Court has arguably challenged that notion. In Grutter v. Bollinger, n118 the 2003 case upholding the use of race-based affirmative action at the University of Michigan Law School, the Court held that racial diversity in the classroom is a compelling state interest. The Court accepted that race alone is sufficient to mark the experience of "being a racial minority in a society in which race unfortunately still matters." n119 The contexts are obviously different, but the core proposition carries over: in our society, being a racial minority provides distinctive experience that yields insight into navigating prejudice. n120 It is an insight that cannot be as routinely attributed to whites. Sharon Rush has made the same point effectively in her personal account of raising her daughter in a transracial family, documenting how her experience transformed her own understanding of race and racial prejudice. n121

The Supreme Court thus found that there is a compelling educational benefit from being exposed to

classmates of different races in a law school or college classroom, because the contributions of minority-race students will inevitably be informed by the distinctive experience of living in a society in which "race . . . matters." If we accept that proposition, it requires only a small leap to imagine a similar benefit to children from being exposed to caregivers and playmates of diverse racial backgrounds, and to accept that minority-race caregivers will have a distinctive base of experience to draw upon in addressing issues of racial prejudice. This is not to suggest, of course, that the advantage of this experience is enormous or all- important, nor that considerations of race should predominate. As Hawley Fogg-Davis has written:

> Race matters, but we need to be careful in thinking about how it ought to matter. Racial expectations weigh heavily on our minds and bodies, but we should not think of these expectations as overpowering our capacity to respond to racial ascription in active ways that foster multifaceted self-concepts. n122

Yet the new HHS enforcement policy considers the racial diversity of the neighborhoods, schools, and churches of prospective adoptive parents essentially irrelevant and wholly out of bounds.

In my view, the U.S. Constitution permits states to inquire specifically into the racial diversity and

"hospitality" of transracial child placements for the same reason it permits colleges and universities to consider race in student admissions: because we live in a society in which "race unfortunately still matters." But the government should be permitted to act upon the information it gathers-to delay or deny a transracial placement-only where the child would provably benefit very substantially.

This approach contemplates that the permissible use of race will be determined case by case, after reasonable inquiry into the home life offered by a prospective parent. Race would then be permitted to guide placement decisions only when it could be shown that particular facts relating to a prospective adoptive home, or to a child's developmental needs, established a very strong benefit from same-race placement. Under this approach, it might well be lawful for an agency to prefer a same-race placement of a minority-race child over placement in an isolated, all-white community with white parents who have no sensitivity to the ongoing reality of racial prejudice in contemporary society. Any such judgment must take into account far more than just race, of course. If the parents in the transracial placement were uniquely equipped to meet the child's special health needs, for example, or if superior placements elsewhere were not readily available, so that alternatives would mean continued impermanence in the child's upbringing, the comparative significance of race would quickly fade. But if, all things considered, evidence established that placing a child in a same-race household would

substantially benefit the child, the Constitution should not be understood to stand in the way.

For many, the indeterminacy of requiring judicial assessments of the substantiality of claimed benefits for children will be deeply unsatisfying. Some will object, not unreasonably, that case-by-case balancing will make it easier for caseworkers who categorically oppose transracial adoption to manipulate outcomes, injecting race even where the facts do not prove its substantial importance. n123 Others from a different perspective will object that it compromises the well-being of children by not making their "best interests" the polestar of all placement decisions. And still others will object that the failure to erect a bright-line bar on race discrimination undermines the principle of equality.

Yet, I see no good alternative in a context in which important constitutional values conflict. Palmore itself, as Barbara Woodhouse has pointed out, rested on a categorical intuition: that taking account of race and prejudice perpetuates racial division. n124 Yet what is unsatisfying about Palmore-and what has left the door open to such confusion in the decades since-is its failure to come to grips with the balancing that is inevitably required in this setting. Palmore acknowledged that children have their own powerful interests at stake in this dilemma, and then promptly set them aside in the cause of eradicating racial prejudice. It is messy and can be misused, but finding some balance point between the intersecting interests of society and children with regard to race

and custody seems to me unavoidable given the flaws of contemporary society, in which "race unfortunately still matters."

V. Conclusion

More than three decades after Palmore v. Sidoti, the nature of the legal constraints on considerations of race in public decisions about children remains contested and unsettled. We are, however, making progress toward a consensus. In part because of Congress's intervention through MEPA and the Interethnic Adoption amendments of 1996, and newly aggressive enforcement of federal law, longstanding barriers to transracial adoption are falling away.

Palmore and related changes in federal constitutional and statutory law have not worked a revolution in family composition; indeed, social preferences for intraracial intimacy remain strikingly durable decades after the removal of legal obstacles. n125 Yet, there are signs of change here as well. The numbers of transracial adoptions are growing both domestically and internationally; the share of African American children adopted from foster care by parents of a different race nearly doubled between 1998 and 2004, n126 and in 2006, Ethiopia became the fifth largest country of origin for children adopted internationally in the United States (up from 16th in 2000). n127 And, importantly, studies of families who have bridged racial lines in

parenting continue to be generally reassuring about the outcomes. n128

Yet, as the Illinois court's recent decision in Gambla reflects, many observers continue to believe that race remains a relevant and often important factor in determining the custodial and familial associations of children. The Illinois court, like others before it, resolved the tension by allowing for race to be freely considered in placing children, so long as race is not given overtly dominant weight. n129 That is progress, to be sure-it removes at least the most heavy-handed categorical uses of race as a qualifying characteristic for parenthood- but it plainly leaves the door open for wide reliance on racial preferences and stereotypes that are wholly unsupported and unsupportable.

In stark contrast, the aggressive posture recently taken by HHS in interpreting federal law effectively pushes race entirely from the field of relevant considerations. Its hostility to considerations of race is so strong that it would forbid not only preferences for same-race placements, but even inquiring into the preparedness of transracial adopters to protect their children against racial prejudice. n130

I have suggested that the strict scrutiny required by the Constitution for racial classifications-the standard that drives HHS's interpretation of the federal statutory prohibitions of race discrimination in child placements-does not compel the degree of color-blindness suggested by the HHS's recent

enforcement actions. Strict scrutiny would not permit routine reliance on race as a factor in placement decisions, but leaves room for reliance where considerations of race are demonstrably necessary to achieving substantial gains in the welfare of an affected child. The available social science does not suggest that children are commonly harmed by transracial placements; indeed, in certain respects they appear to enjoy distinct benefits. Yet, studies also suggest that the readiness of transracial adoptive parents to anticipate and address issues relating to race is an important factor in ensuring that success. n131 At a minimum, then, some specialized inquiry into the preparedness of transracial adoptive parents seems justifiable. Beyond that, considerations of race in child placement must depend upon empirical proof that, for a particular child, the benefits of preferring a same-race placement would be sufficiently significant to justify the social costs of race-conscious decisionmaking. While the available evidence suggests this will not be often, it remains incomplete and recognizes-as should the Constitution-that the circumstances and needs of some individual children are exceptional.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law/Adoption/Adoption & Safe Families Act
Family Law/Adoption/Indian Child Welfare Act

Family Law/Delinquency & Dependency/Foster Care

FOOTNOTES:

n1 See, e.g., Gypsy Law: Romani Legal Traditions and Culture (Walter O. Weyrauch ed., 2001); Walter O. Weyrauch, Unwritten Constitutions, Unwritten Law, 56 Wash. & Lee L. Rev. 1211 (1999); Walter O. Weyrauch, Oral Legal Traditions of Gypsies and Some American Equivalents, 45 Am. J. Comp. L. 407 (1997); Walter O. Weyrauch & Maureen Anne Bell, Autonomous Lawmaking: The Case of the "Gypsies," 103 Yale L.J. 323 (1993); Walter O. Weyrauch, The "Basic Law" or "Constitution" of a Small Group, 27 J. Soc. Issues 49 (1971); Walter O. Weyrauch, The Law of a Small Group: A Report on the Berkeley Penthouse Experiments with Emphasis on Penthouse V (Space Sciences Laboratory, Univ. of Cal., Berkeley, Internal Working Paper No. 54, 1967); Walter O. Weyrauch, Law in Isolation: The Penthouse Astronauts, Trans- Action, June 1968, at 39.

n2 See Walter O. Weyrauch, The Romani People: A Long Surviving and Distinguished Culture at Risk, 51 Am. J. Comp. L. 679 (2003); Walter O. Weyrauch, An Immigrant's Encounter with Race in America, 48 Fla. L. Rev. 445 (1996).

n3 466 U.S. 429 (1984).

n4 See Barbara Bennett Woodhouse, "Are You My Mother?": Conceptualizing Children's Identity Rights

in Transracial Adoptions, 2 Duke J. Gender L. & Pol'y 107, 120 (1995) (observing that "[t]ransracial adoption combines some of the most potent dilemmas of modern America . . .").

n5 See Dorothy Roberts, Shattered Bonds: The Color of Child Welfare (2002); Twila L. Perry, Race Matters: Change, Choice, and Family Law at the Millennium, 33 Fam. L.Q. 461 (1999); Annette R. Appell, Disposable Mothers, Deployable Children, 9 Mich. J. Race & L. 421 (2004); Cristina White, Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act, 1 Nw. J.L. & Soc. Pol'y 303 (2006).

n6 See Elizabeth Bartholet, Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative 130-40 (1999); R. Richard Banks, The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action, 107 Yale L.J. 875 (1998).

n7 Roberts, supra note 5, at 165 (asserting that racial politics undergird support for transracial adoption); Banks, supra note 6, at 880 (noting that "race politics" underlie the debate over children's best interests in transracial adoption); Kenneth L. Karst, Law, Cultural Conflict, and the Socialization of Children, 91 Cal. L. Rev. 967, 984 (2003) (observing that in the controversy over transracial adoption "the label 'racial discrimination' is deployed on both sides of the argument").

n8 Palmore, 466 U.S. at 429.

n9 Id. at 433-34.

n10 See Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 385 (2003) (concluding that while some judges continue to limit the Court's mandate on pretextual grounds, "Palmore does appear to have made a difference in the resolution of some litigated disputes").

n11 See Elizabeth Bartholet, Where Do Black Children Belong? The Politics of Race Matching in Adoption, 139 U. Pa. L. Rev. 1163 (1991); Kim Forde-Mazrui, Note, Black Identity and Child Placement: The Best Interests of Black and Biracial Children, 92 Mich. L. Rev. 925, 930-32 (1994) (noting that Palmore left considerable uncertainty in the lower courts).

n12 See Joan Mahoney, The Black Baby Doll: Transracial Adoption and Cultural Preservation, 59 UMKC L. Rev. 487, 497 (1991); David S. Rosettenstein, Trans-Racial Adoption and the Statutory Preference Schemes: Before the "Best Interests" and After the "Melting Pot," 68 St. John's L. Rev. 137 (1994).

n13 See Bartholet, supra note 6, at 130-40 (describing the determination of many child-welfare workers to circumvent federal anti-discrimination mandates through "creative 'interpretations'" of federal law); cf. Solangel Maldonado, Discouraging

Racial Preferences in Adoptions, 39 U.C. Davis L. Rev. 1415, 1457 (2006) (observing that, "[u]ndoubtedly, some agencies continue to race match, in contravention of the law . . .").

n14 See In re Marriage of Gambla, 853 N.E.2d 847 (Ill. App. Ct. 2006).

n15 See id. at 868-69.

n16 See id. at 868 (noting that trial court had "believed that [race] . . . tipped the scale slightly . . ." in favor of the mother).

n17 See Elizabeth Bartholet, Commentary: Cultural Stereotypes Can and Do Die: It's Time to Move on with Transracial Adoption, 34 J. Am. Acad. Psychiatry L. 315, 317 (2006) (describing the "dramatic new development . . . on the enforcement front").

n18 See id. at 317-19.

n19 See id.

n20 See Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, §§ 551-54, 108 Stat. 3518, 4056-57 (1994); Removal of Barriers to Interethnic Adoptions, § 1808 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903-04 (1996) (codified at 42 U.S.C. § 671(a)(18)).

n21 The statutes were both held unconstitutional in the late 1960s and early 1970s. See In re Adoption of Gomez, 424 S.W.2d 656 (Tex. Civ. App. 1967); Compos v. McKeithen, 341 F. Supp. 264 (E.D. La. 1972).

n22 Kennedy, supra note 10, at 3-12.

n23 See id. at 387. Most accounts trace the history of transracial adoption to a 1948 case in which white foster parents in Minnesota adopted the Black foster child in their care. See Hawley Fogg-Davis, The Ethics of Transracial Adoption 3 (2002); Ruth-Arlene W. Howe, Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo, 6 B.U. Pub. Int. L.J. 409, 441 (1997).

n24 See Barbara Melosh, Strangers and Kin: The American Way of Adoption 165 (2002) (recounting how "[t]he optimism of the early civil rights movement inspired some white adopters to claim African American children as their own").

n25 Rita J. Simon & Howard Altstein, Adoption, Race & Identity: From Infancy to Young Adulthood 10 tbl.1.5 (2d ed. 2002).

n26 Id. at 14-15 (quoting position paper of the NABSW presented at its 1972 national conference); see also Barriers to Adoption: Hearings Before the S. Comm. on Labor and Human Res., 99th Cong., 214-18 (1st Sess. 1985) (statement of William T. Merritt, President, Nat'l Ass'n of Black Social Workers).

n27 See Simon & Altstein, supra note 25, at 10 tbl.1.5.

n28 See Matthew L.M. Fletcher, Sawnawgezewog: "The Indian Problem" and the Lost Art of Survival, 28 Am. Indian L. Rev. 35, 39-40 n.25 (2003-2004).

n29 See Cynthia G. Hawkins-Leon, The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis, 36 Brandeis J. Fam. L. 201, 202 (1997-1998); Simon & Altstein, supra note 25, at 18.

n30 Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. § 1901 (2000).

n31 See Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989). See also 25 U.S.C. §§ 1901-1915; Barbara Ann Atwood, Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance, 51 Emory L.J. 587, 605-23 (2002) (describing ICWA's key features and operation).

n32 See Bartholet, supra note 11, at 1189-96; Joan Heifetz Hollinger, A Guide to the Multiethnic Placement Act of 1994 as Amended by the Interethnic Adoption Provisions of 1996, ch. 1(C) (ABA Center on Child. & Law 1998), available at http://www.acf.hhs.gov/programs/cb/pubs/mepa94/mepachp1.htm (last visited June 4, 2007).

n33 See Palmore v. Sidoti, 466 U.S. 429 (1984).

n34 Id. at 430.

n35 Id.

n36 See id. at 430-31.

n37 Id. at 431.

n38 Palmore, 466 U.S. at 432.

n39 Id. at 433.

n40 Id. at 434; see also Katharine T. Bartlett, Comparing Race and Sex Discrimination in Custody Cases, 28 Hofstra L. Rev. 877, 881 (2000) (observing that Palmore "concluded almost categorically that the harm of considering race in a custody case is greater than the possible gains").

n41 Palmore, 466 U.S. at 433.

n42 U.S.C. § 2000d (2006).

n43 See Grutter v. Bollinger, 539 U.S. 306, 343 (2003); General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 389-91 (1982).

n44 See Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 553(a)(1), 108 Stat. 3518, 4056 (1994).

n45 Id. § 553(a)(2).

n46 Id. For discussion of MEPA's original enactment and its subsequent amendment, see Bartholet, supra note 6, at 130-33; Hollinger, supra note 32.

n47 Removal of Barriers to Interethnic Adoptions, § 1808 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903-04 (1996) (codified at 42 U.S.C. § 671(a)(18)).

n48 See supra text accompanying notes 27, 32.

n49 Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 675(5)).

n50 See Richard P. Barth et al., From Anticipation to Evidence: Research on the Adoption and Safe Families Act, 12 Va. J. Soc. Pol'y & L. 371, 372-76 (2005). For opposing views of ASFA's impact on children, compare Bartholet, supra note 6, at 188-89 (generally approving ASFA), with Martin Guggenheim, What's Wrong with Children's Rights 174-212 (2005), and Martin Guggenheim, Ratify the U.N. Convention on the Rights of the Child, But Don't Expect Any Miracles, 20 Emory Int'l L. Rev. 43, 61 (2006) (contending that ASFA reflects "America's penchant for destroying families in the name of advancing children's rights").

n51 See Jess M. McDonald et al., Nation's Child Welfare System Doubles Number of Adoptions from Foster Care, at 1 (Univ. of Illinois Sch. of Soc. Work, Child. & Fam. Res. Ctr. Oct. 2003), available at http://www.fosteringresults/results/reports/pewrepor

ts10-1-03doubledadoptions.pdf; Barth et al., supra note 50, at 385-88 (analyzing increase in adoption rate from foster care since ASFA's enactment).

n52 See Lynette Clemetson & Ron Nixon, Breaking Through Adoption's Racial Barriers, N.Y. Times, Aug. 17, 2006, at A1.

n53 Interagency Task Force on Adoption, America's Waiting Children: A Report to the President from the Interagency Task Force on Adoption (1988).

n54 853 N.E.2d 847 (Ill. App. Ct. 2006).

n55 Id. at 861-62, 870.

n56 Id. at 861-62, 866-68.

n57 Id. at 868. The trial court's decision to match a biracial child with her African American mother rather than with her white father has precedent in a series of earlier divorce custody cases. See Forde-Mazrui, supra note 11, at 935-36 (reviewing cases); Twila L. Perry, Race and Child Placement: The Best Interests Test and the Cost of Discretion, 29 J. Fam. L. 51 (1990-1991).

n58 In re Marriage of Gambla, 853 N.E.2d at 869 (emphasis in original).

n59 Id.

n60 Id.

n61 See Palmore v. Sidoti, 472 So. 2d 843, 844 (Fla. App. Ct. 1985) (among others, Melanie had suffered from head lice and poor hygiene); Kennedy, supra note 10, at 380-81.

n62 See Palmore v. Sidoti, 466 U.S. 429, 430 (1984) (quoting trial court's opinion).

n63 438 U.S. 265 (1978).

n64 Id. at 317-18.

n65 See Gratz v. Bollinger, 539 U.S. 244, 246-47 (2003).

n66 Drummond v. Fulton Co. Dep't of Fam. & Children's Servs., 563 F.2d 1200 (5th Cir. 1977) (en banc). For an eloquent discussion of Drummond and its aftermath, see Carl E. Schneider, Strangers and Brothers: A Homily on Transracial Adoption, 2 Whittier J. Child & Fam. Advocacy 1 (2003).

n67 Id. at 1205.

n68 Id.

n69 See Johnson v. California, 543 U.S. 499, 505 (2005); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226-27 (1995).

n70 Drummond, 563 F.2d at 1205-06.

n71 Id. at 1206.

n72 See Johnson, 543 U.S. at 509-15.

n73 Kennedy, supra note 10, at 433. Bartholet, writing in 1999, similarly observed that HHS "has been awfully quiet" and found no "evidence of the kind of enforcement activity that would make significant change in the near future seem likely." Bartholet, supra note 6, at 133; see also Schneider, supra note 66, at 4 & n.16 (discussing the HHS's failure to enforce MEPA vigorously).

n74 Letter of Findings, from Lisa M. Simeone, Regional Manager of the Office for Civil Rights, U.S. Dep't of Health & Hum. Servs., to Suzanne A. Burke, Director of the Hamilton Cty. Dep't of Hum. Servs., & Tom Hayes, Director of the Ohio Dep't of Job & Fam. Servs. (Oct. 20, 2003) [hereinafter Ohio Letter of Findings], available at www.hhs.gov/ocr/mepa/hamilton co2.pdf.

n75 See Bartholet, supra note 17, at 317.

n76 Ohio Letter of Findings, supra note 74, at 15.

n77 Id.

n78 Id. at 16.

n79 Id.

n80 Id. at 17.

n81 Ohio Letter of Findings, supra note 74, at 18.

n82 Id.

n83 Id.

n84 Civil Rights Act of 1964, 42 U.S.C. § 2000a.

n85 Ohio Letter of Findings, supra note 74, at 18-19.

n86 Id.

n87 See id. at 54, 58.

n88 Id. at 55-56. HHS found that agency had repeated its violation of title VI when it made similar inquiries of other white prospective adoptive parents, including Chad and Ruth Lamm of rural Easton, Illinois stating: HCDHS employed race-based criteria in evaluating the Lamms as prospective adoptive parents for Leah. HCDHS sought out information about how much contact the Lamms had with the African American community and whether there were African American teachers or students in the local school system . . . HCDHS based its need for race-based inquiries solely on the fact that Leah was of a different race than the Lamms. Id. at 20.

n89 Bartholet, supra note 6, at 132.

n90 See id at 132-33 (quoting HHS "Guidance" Memorandum dated June 5, 1997).

n91 Penalty Letter from Wade F. Horn, Assistant Secretary for Children and Families, HHS, to Tom Hayes, Director of the Ohio Dep't of Job & Fam.

Servs. (Oct. 20, 2003), available at www.law.harvard.edu/faculty/bartholet/mepa.php (last visited Mar. 6, 2007).

n92 Bartholet, supra note 17, at 319.

n93 Letter of Findings from Roosevelt Freeman, Regional Manager of HHS Office for Civil Rights, to Kim S. Aydlette, Director of the South Carolina Dep't of Soc. Servs. (Oct. 31, 2005) [hereinafter South Carolina Letter of Findings], available at http://www.hhs.gov/ocr/mepa/LOFFINALOct3105.pdf

n94 Id. at 22.

n95 Id.

n96 See id. at 24.

n97 Id. at 23. In addition, HHS also found that South Carolina violated MEPA and title VI by going out of its way to accommodate the racial preferences of birth mothers in placing children and using race as a "'tie-breaking' factor among families otherwise equally appropriate for a child." Id. at 20, 26-27.

n98 Penalty Letter from Wade F. Horn, Assistant Secretary for Children and Families, HHS, to Kim Aydlette, Director of South Carolina Dep't of Soc. Servs., at 3 (Feb. 24, 2006), available at www.law.harvard.edu/faculty/bartholet/mepaSCsignedpenaltyletter.pdf.

n99 See supra text accompanying note 54.

n100 See, e.g., Ohio Letter of Findings, supra note 74, at 11 ("The only compelling governmental interest for race-based decisionmaking in the context of adoption and foster care placements is protecting the 'best interests' of the child who is to be placed.").

n101 Palmore v. Sidoti, 466 U.S. 429, 433-34 (1984). As Margaret Brinig points out, it is of course possible that the trial court's concern with the child's "best interests" was pretextual and intended to "provide cover for a more sinister agenda." Margaret F. Brinig, The Child's Best Interests: A Neglected Perspective on Interracial Intimacies, 117 Harv. L. Rev. 2129, 2147 (2004).

n102 Palmore itself seems inconsistent with genuine recognition of a child's best interests as a compelling public interest, since the trial court's undisturbed "best interests" finding was insufficient to sustain its custody order. In addition, Reno v. Flores, 507 U.S. 292, 304 (1993), DeBoer v. DeBoer, 509 U.S. 1301, 1302 (1993), and Caban v. Mohammed, 441 U.S. 380, 391 (1979), each subordinate claims concerning the "best interests" of children to other constitutional values, suggesting that the asserted interest is something less than truly "compelling."

n103 Cf. Richard W. Garnett, Taking Pierce Seriously: The Family, Religious Education, and Harm to Children, 76 Notre Dame L. Rev. 109, 114 (2000); cf. Perry, supra note 57, at 56-57 (contending

that "in the child placement decisionmaking where racial differences are present, the touchstone rule of custody- the best interests rule-does little to assist in analyzing or resolving the difficult issues often presented").

n104 See David D. Meyer, The Constitutional Rights of Non-Custodial Parents, 34 Hofstra L. Rev. 1461, 1489-90 (2006).

n105 See Joan Catherine Bohl, Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm, 48 Drake L. Rev. 279, 331 (2000); Garnett, supra note 103, at 114; In re Custody of Smith, 969 P.2d 21, 28-29 (Wash. 1998), aff'd on other grounds, sub. nom. Troxel v. Granville, 530 U.S. 57 (2000).

n106 530 U.S. 57 (2000).

n107 For an extended analysis of the opinions in Troxel, see David D. Meyer, Lochner Redeemed: Family Privacy After Troxel and Carhart, 48 UCLA L. Rev. 1125 (2001).

n108 In re Marriage of Gambla, 853 N.E. 2d 847, 871 (Ill. App. Ct. 2006).

n109 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)); see also Johnson v. California, 543 U.S. 499, 507 (2005)

(discussing the harm that comes from government policies that "perpetuat[e] the notion that race matters most").

n110 Perry, supra note 57, at 69. For additional discussion of the costs to children, see Elizabeth Bartholet, Race Separatism in the Family: More on the Transracial Adoption Debate, 2 Duke J. Gender L. & Pol'y 99, 100 (1995) (observing that barriers to transracial adoption "separate children and prospective parents into racial categories, assign children to racially-matched parents, and hold children for whom there is no racial match available . . ."); Bartholet, supra note 11, at 1223-26 (reviewing "the evidence as to costs for children of current inrace placement preferences"); Forde-Mazrui, supra note 11, at 936-43 (describing "the psychological costs to individual Black children when courts and agencies practice racial matching.").

n111 See Perry, supra note 57, at 126-27.

n112 See Rita J. Simon & Rhonda M. Roorda, In Their Own Voices: Transracial Adoptees Tell Their Stories 13-25 (2000); Simon & Altstein, supra note 25; Arnold R. Silverman, Outcomes of Transracial Adoption, 3 Future of Children 104, 117 (1993); Kathleen L. Whitten, Permanent Families for African-American Foster Children in an Imperfect World, 12 Va. J. Soc. Pol'y & L. 490, 495-97 (2005). But cf. Margaret F. Brinig, Promoting Children's Interests Through a Responsible Research Agenda,

14 U. Fla. J.L. & Pub. Pol'y 137, 149-51 (2003) (noting limitations in available studies).

n113 Bartholet, supra note 11, at 1255.

n114 See Kennedy, supra note 10, at 468-78; Simon & Roorda, supra note 112.

n115 See Schneider, supra note 66, at 9.

n116 Whitten, supra note 112, at 497.

n117 Palmore v. Sidoti, 466 U.S. 429, 433-34 (1984).

n118 539 U.S. 306, 343 (2003).

n119 Id. at 333.

n120 See Tanya Washington, Loving Grutter: Recognizing Race in Transracial Adoptions, 16 Geo. Mason U. Civ. Rts. L.J. 1, 10-12 (2005). Hawley Fogg-Davis has written perceptively about the complex process of "racial navigation," in which "individuals . . . challenge existing racial meanings in a lifelong process of self-reflection and -revision." Fogg-Davis, supra note 23, at 2.

n121 See Sharon E. Rush, Loving Across the Color Line: A White Adoptive Mother Learns About Race (2000). Rush writes, for instance, "[a]s I write this book and look back over the years . . . , my understanding of the complexities of race make me realize how limited my views were when my daughter was a baby." Id. at 23.

n122 Fogg-Davis, supra note 23, at 113.

n123 Randall Kennedy, for example, argues that "pragmatic considerations counsel in favor of the institution and enforcement of a strict antidiscrimination norm in adoption," because "[n]othing less will break the deeply entrenched habit of race matching that remains rife throughout this country." Kennedy, supra note 10, at 417-18; accord Bartholet, supra note 6, at 130 (warning that "any leeway given to utilize race would be used to evade [the antidiscrimination mandate]").

n124 Woodhouse, supra note 4, at 124.

n125 See Rachel Moran, Interracial Intimacy 99-101 (2001); Banks, supra note 6, at 887-88; Bartholet, supra note 11, at 1204-06; Joanna L. Grossman & John DeWitt Gregory, The Legacy of Loving, 51 How. L.J. (forthcoming 2007).

n126 See supra note 52 & accompanying text.

n127 See Jane Gross & Will Connors, Surge in Adoptions Raises Concerns in Ethiopia, N.Y. Times, June 4, 2007.

n128 See supra notes 112-14 & accompanying text. But cf. Brinig, supra note 101, at 2150-59 (presenting empirical data suggesting some additional risks for children raised by interracial couples).

n129 See supra text accompanying notes 58-60.

n130 See supra text accompanying notes 94-97.

n131 See Whitten, supra note 112, at 497.